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HUSBAND AND WIFE.

Interest of husband in wife's legacy or distributive share of personalty before reduction into possession.

The interest which the husband has in the distributive share of an estate, to which the wife may become entitled during coverture, has been a somewhat perplexing question with our American courts, as well as the English, and has resulted in a conflict of opinions. The same principles also govern in the case of a legacy to which she should in like manner become entitled. The point of difference has been in defining the extent of the husband's interest in such share or legacy, upon the death of the wife's parent, previous to the husband's taking possession of the same. It is held by some of the courts that such share or legacy vests absolutely in the husband, upon the death of the wife's ancestor, while by others that the husband possesses but a qualified interest in the same; an inchoate right, which he must perfect by reducing the same to possession during coverture, or it will survive to the wife. It is not our purpose to discuss which of these propositions is sustained by the weight of authority, but as it is apparent that upon the death of the husband previous to having reduced such share or legacy to possession, not only the rights of the wife and of the representatives of the husband, but the rights of the husband's creditors are variously affected by these different propositions, it becomes a matter of interest to examine and see how far these last mentioned rights have been defined in a manner consistent with the doctrine of the hus-

band's interest as held by the same court. These rights are appended as inferences or consequences to these diverse doctrines, and as far as practicable they should be made a consistent whole. Incongruity in this matter has the effect to detract from the respect which we might otherwise entertain for the opinion of the court.

The first case to which we would refer, (and here let us say it is our intention to refer but to a few cases, and to those because they are the opinions of able courts, and are conflicting,) is the case of *Griswold* v. *Penniman*, 2 Conn. 565. This case is distinguished both on account of the character of the judge who pronounced the opinion, (Ch. J. Swift,) and the clearness and precision which mark the style and language of the opinion itself. The case was this: — Joshua Starr died intestate, leaving personal estate, and children, among whom was Mary, wife of John Penniman. Administration was taken upon the estate of the deceased, but no distribution was made until after the death of John Penniman. Mary Penniman took out letters of administration, upon the estate of John Penniman, and gave the bond upon which the action was brought. The breach relied upon was that she had not inventoried, as part of the estate of John Penniman, that portion of the estate of Joshua Starr which was distributed to her as one of his heirs. It was claimed by the plaintiff, that this property, on the death of Joshua Starr, vested absolutely in the husband. For the defendant, on the contrary, it was contended that it vested in Mary Penniman, as a chose in action, not reduced to possession, and so remained during coverture; and on the death of her husband survived to her.

The court say with respect to choses in action accruing during coverture, "These vest absolutely in the husband, on the principle that the husband and wife are but one in law, and her existence in legal contemplation is merged in his. He may, in such case, bring a suit in his own name without joining his wife. This clearly proves that the chose in action vests in him absolutely; for if the right was in the wife she must necessarily join with him in the suit." The court then cite the case of *Barlow* v. *Bishop*, 1 East, 432, in support of the husband's right thus to sue alone. That was a case where the husband was permitted to sue in his own name alone upon a bond given to the wife.

We do not propose to examine the correctness of the

inference of the court in this case, that the right of suing alone in such case which the husband possesses, necessarily presupposes an exclusive right of property; but if that right be established, it follows that the wife's right, as the survivor, does not attach any more than to the other choses in action of the husband, not accruing in right of the wife.

This case was examined and reviewed subsequently in the case of *Wintercast* v. *Smith*, 4 Rawle, 177, where it appears to have been relied upon as an authority. The case in Connecticut was a claim for a distributive share, that in Pennsylvania, for a legacy. The latter court proceed upon the ground that no distinction can be made between them on that account. In the latter case, a legacy was left to a married woman, whose husband had deserted her, and from whom she was subsequently divorced. After the divorce she demanded payment of the legacy, which was refused, on the ground that the husband alone was entitled to it, though he had never demanded it. The court give the same effect to the divorce previous to the husband's reducing the legacy to possession, that was given to the decease of the husband in the former case, and decided that the legacy was but a chose in action, and not having been reduced to possession by the husband, the wife was entitled to it.

This interest of the husband is held in New Hampshire to be but a qualified interest. *Parsons* v. *Parsons*, 9 N. H. 309; and in a subsequent case of *Wheeler* v. *Moore & Tr.* 13 N. H. 478, Parker, Ch. J. says: "That a husband has a right to claim such distributive share to his own use, but that he is not obliged to exercise that right. If he omits to do so, on his death the right will survive to the wife in her own right, and as to their estate; and if he neglect or refuse to reduce it to possession, it is clear that after his death, neither his heirs or his creditors could assert any claim to it." The language of New Hampshire is adopted by the court of Vermont. The court held that even after the decree of distribution, the husband has but a conditional interest, which the husband must make complete and perfect; otherwise it survives to the wife. In New Hampshire it appears that the creditors of the husband are not permitted to reach such property, thus carefully shielding it from his grasp, by holding the doctrine that he has never become invested with a complete interest, or property. The proceeding in Vermont was by trustee process on behalf of a creditor to

reach money in the hands of an administrator, and the administrator was adjudged not to be a trustee; and upon the same principle.

In the State of Massachusetts, in the case of *Gasset* v. *Grout*, 4 Met. 486, the court treat it as a well settled rule, that "the property of the husband in the rights and choses in action of the wife is not absolute and unlimited," and in *Davis and others* v. *Newton*, 6 Met. 543, that "the husband may reduce the wife's choses in action to possession, and assign the same to his creditors; but ordinarily he is not compellable to do so, and if he does it, and they require the aid of a court of justice, it will not be granted, unless a suitable provision be made out of it for the wife. And this is an equity which courts will uphold in all cases where the husband, his creditors, or his assignees, have occasion to come into court to obtain possession of the property, and whenever a court of equity can in any form exercise jurisdiction over the subject." The court also, as it appears from this case, by virtue of the general chancery jurisdiction with which it is vested over all subjects, assumes to maintain such equity of the wife, "as well upon a bill or petition filed on the part of the wife as on a proceeding instituted by the creditors or assignees of the husband," and cite *Kenny* v. *Udall*, 5 Johns. Ch. 464, and *Haviland* v. *Bloom*, 6 Ibid. 178, in support of such right. It will be observed that the court make use of the language "rights" and "choses in action" of the wife, intending, it is apparent, to express themselves in terms broad enough to include distributive shares in the estate of an intestate, and legacies, if the term choses in action should not be considered sufficiently broad.

The view which the court take in this case of the nature and extent of the husband's interest in such right of the wife, is expressed in language of a similar import in a case at law. *Wheeler* v. *Bowen & Tr.* 20 Pick. 567, though in that case the interest of the husband in a distributive share of the wife, was permitted to be attached by trustee process. As the language of the court in this case recognizes an interest, though qualified, yet not conditional or dependent solely upon the will of the husband to obtain it, by exercising the right of reducing it to possession, which is the language of New Hampshire and Vermont, we will insert it. The court say: "While we give to the *feme covert* her right in case of her survivorship to her choses in action accruing during coverture, and which her husband has not

reduced to possession, yet we consider it as the law of this Commonwealth, that the interest of the husband to the extent he possesses it, may be seized by his creditor. The right of the husband is a qualified one, subject to be defeated if not exercised in his lifetime; but while living he has the absolute control over it, and may collect the demand and appropriate the proceeds to his own use. This right his creditor may secure by the trustee process, which operates in this respect as a statute assignment of the interest of the husband."

The substance of the foregoing opinion is, that the husband has a definitive interest in the wife's choses in action, namely, the right of reducing her choses in action to possession during coverture, and which may be taken by the husband's creditors.

In the case in Metcalf, above referred to, which was a proceeding in chancery to enforce the wife's equity to property claimed by an assignee of the insolvent husband, who was proceeding to reduce such choses in action to possession, the case in 20 Pick. is referred to as one in which the proceedings were strictly legal, "where the right of attachment was considered as given to the creditor by statute, and where, therefore, there could be no apportionment. The attachment must be considered valid for the whole or nothing; and principles of equity would not be applied."

In cases where the court had full equity jurisdiction, the wife's equity could be reached and preserved.

With respect to the wife's equity, the court say: "The general doctrine of the wife's equity, arising out of the legal right of survivorship, has been recognized as the law of the Commonwealth in a case in which it was also decided that the mere assignment of a wife's choses in action by the husband were for a valuable consideration, was not such a reduction to possession as to take away the wife's right of survivorship, and consequent equitable interest."

The courts of New Hampshire and Vermont, recognize the husband's right to assign the wife's choses in action for a valuable consideration, but subject likewise to the wife's equity.

We have thus referred to some of the cases in which the courts have differed materially in defining the interest of the husband in the wife's choses in action which occurred during coverture. In this respect we find the court of Connecticut so far alone. It might be noted here that it fully appears from the case in Pennsylvania, that the husband's

right accrued during coverture, but the same rule of investiture applies, as well in Pennsylvania, as the other States, (the decisions of whose courts have here been referred to,) both to choses in action to which the wife became entitled before and after marriage.

Connecticut thus far standing alone, let us see if the conclusions to which the courts have arrived, who have recognized essentially the same doctrine, are uniform. I think we shall find that they are not. With respect to the wife's equity they agree, with the exception of Massachusetts, who cuts it off in one instance, namely, where a lien has been created by attachment.

And here we find Massachusetts standing alone in permitting creditors to reach this interest by trustee process, as it appears they can from the case in 20 Pick. It appears from the quotation from the decision in New Hampshire that such is not the case there, and in the case of *Short* v. *Moore Tr.*, 10 Vermont, 446, the court hold expressly that such interest cannot be reached by such process.

That right to appropriate exclusively to his own use, which the husband possesses over the choses in action of the wife, which the courts of Massachusetts hold to be attachable by trustee process, was more particularly defined, in contradistinction to the exclusive right of property, which he acquires therein by taking possession, in a late case decided in New York, *Westervelt* v. *Gregg*, 2 Kern. 204. The case is peculiar from the manner in which the question arose. The question arose upon the effect of the statute of 1848, for the more effectual protection of the property of married women.

The husband had a vested interest in a legacy, which was bequeathed to the wife, prior to the act of 1848, although the legacy was not reduced to possession when the act took effect. The court decided that the legislature had no power to deprive the husband of his right to such legacy, and make it the sole and separate property of the wife. In the outset the court say: "That a legacy or distributive share is regarded as a chose in action, and as far as the rights of the husband are concerned, it stands upon the same footing as a promissory note or other property of a similar character. The general rule of the common law is, that the husband has the right to reduce the choses in action of the wife into possession, but that until he does so, they do not vest in him as his own property; and in case he dies in the lifetime of the wife, they survive to her."

Such is the language of the court as between husband and wife; but when speaking of this interest in connection with that part of the case which holds that the statute is unconstitutional, so far as it purports to deprive the husband of his right to such legacy, as it violates that provision of the constitution which declares that no person shall be deprived of property, without due process of law, the court proceed to say: "That a right to reduce a chose in action is one thing, and a right to the property which is the result of the process by which the choses in action has been reduced to possession, is another and a different thing. But they are both equally vested rights. The one is a vested right to obtain the thing with the certainty of obtaining it, by resorting to the necessary proceedings, unless there be a legal defence, and the other is a vested right in the thing itself after it has been obtained." They hold that this authority to collect is for the husband's "own benefit."

The court cites upon this part of the case, *Gallego* v. *Gallego*, 2 Brock. 286, and quotes Chief Justice Marshall's language, that "the husband had no interest in the legacy of his wife; he has only a power to make it his by reducing it to possession." And it rejects the doctrine of *Clarke* v. *McCreary*, 12 Sm. & Marsh. 347, which was similar to the case in New York in all respects; but in which the court of Mississippi arrive at an opposite conclusion.

The court further held that it was not a right that could be taken in execution; and that a court of equity would not compel the husband to exercise it in favor of his creditors, and that it would pass under a general assignment in bankruptcy, or under insolvent laws, subject however to the right of survivorship in the wife. Also that the husband may cut off that right by an assignment for valuable consideration, although the wife's right to an equitable possession for her support cannot be thus taken away.

It appears therefore that the law of New York differs from that of all the other States in its definition of the husband's right. The husband does not become vested with the right of property, whenever the wife's right accrues, upon the ground that the husband and wife in law are one, as is the case in Connecticut, (*Griswold* v. *Penniman*, subsequently affirmed in *Morgan* v. *Thames Bank*, 14 Conn. 99; and *Winton* v. *Barnum*, 19 Conn. 172–175;) neither does he become invested with an inchoate right to be perfected by proceeding to take possession of the property, as is the more general language of the cases, but this right, authority, or

power of the husband, is a vested interest which cannot be taken away by an act of the legislature declaring the legacy to belong to the wife.

We have seen that the court of Mississippi made no such distinction, but proceeded upon the ground, (which it must be admitted is the more generally received doctrine,) that the interest is a qualified one, belonging to the husband by virtue of the relation existing between the husband and wife, and unless exercised during coverture, the wife's right remains. What other doctrines may have been engrafted upon this, by the court of Mississippi, regulating the rights of survivorship, the husband's ability to assign for valuable consideration, &c., we will not here inquire.

But we will refer to no more instances, or institute a comparison between the doctrines of the different courts referred to, for though there may be some logical inconsistencies between the doctrines engrafted thereon, and the estate as defined, yet we are assured that the law of the State or Commonwealth will sustain the wife's right of survivorship, upon which rests her equity, whether the husband have a qualified or conditional interest previous to taking possession, and whether the right to sue be an exclusive right vested in him or not; and to the doctrine independently considered, no objection can be made.

Perfect consistency, logically speaking, has been preserved by Connecticut alone; for having invested the husband with the right of property, while the others gave him only a right of suit, such property must, of course, be subject to the same rules of distribution and descent as the other property of the husband.

As was stated in the outset, the subject has been a perplexing one to the courts, leading, from its very nature, to conflicting opinions; but the tendency of legislation is not only to preserve for the wife the property which she had in her own right, but to make adequate provision, whenever it can be done, for her out of the estate of the husband.

A.

Circuit Court of the United States. Third Circuit.
May, 1857.

XAVIER BAZIN *v.* JOSEPH RICHARDSON.

A bill of lading acknowledged the receipt of goods at Havre, "to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship City of Manchester, or other steamship appointed to sail for Philadelphia on Wednesday the 6th day of September, and failing shipment by her, then by the first steamship sailing after that date for Philadelphia." The goods arrived before the 6th of September, and were shipped by the steamer which sailed on the 30th of August, which was not the one named in the contract. *Held*, that the contract had not been complied with by the shipowners, and that they must be considered as insuring the goods against loss, even if it arose from causes excepted by the bill of lading.

In an action against a carrier for loss of goods shipped under a bill of lading, in which accidents of the sea are excepted, it is not enough for the defendant to show that the vessel was wrecked, he must also show that the loss was not occasioned by the fault of the officers of the ship, or defect of the ship itself.

In such an action for the loss of goods which have no known or wholesale market value in the place of delivery, the measure of damages must of necessity be what it would cost to replace them; that is, the original cost and charges, with interest for the time necessary to procure the like articles.

APPEAL from a decree of the District Court. The libellant was retailer of perfumery in Philadelphia. In the summer of 1854, he went to Europe to purchase a stock of goods and materials for his business. They were shipped from Havre to Philadelphia. The respondents were the owners of a line of steamships sailing between the ports of Liverpool and Philadelphia. They had their agents stationed at Havre, authorized to receive goods and to issue bills of lading. On the 28th of August, 1854, their agent at Havre gave the libellant a bill of lading, containing the following clause, viz.: — "Received in and upon the steamship called the Shamrock, whereof is master, for the present voyage, Little, or whoever else may go as master in the said ship, and now lying in the port of Havre, and bound for Liverpool, eighteen cases of merchandise, the said goods to be transhipped at Liverpool on board the Liverpool and Philadelphia steamship, City of Manchester, or other steamship appointed to sail for

Philadelphia on Wednesday, the 6th day of September; and failing shipment by her, then by the first steamship sailing after that date for Philadelphia, and are to be delivered in like good order and condition, at the aforesaid port of Philadelphia." The bill of lading contained certain exceptions which are given in the opinion of the court, one of which was "accidents of the seas." The freight was to be paid in Philadelphia.

The respondents also owned, as one of their line, another steamship called the City of Philadelphia, which was appointed to sail on the 30th of August, 1854, for the port of Philadelphia. The libellant's eighteen cases, by the Shamrock, arrived at Liverpool in time to put them on board of the City of Philadelphia. The respondents accordingly shipped sixteen of them by her; the other two were afterwards shipped by the City of Manchester, on the 6th of September, 1854. The City of Philadelphia was a new vessel, built of iron, and under able command. She sailed on her first voyage from Liverpool bound to Philadelphia, on the 30th of August, 1854. On the 7th September, 1854, while on her voyage, she struck the point of Cape Race, and was wrecked, at which time she was thirty miles out of her proper course. She struck in a dense fog. A portion of the libellant's goods were recovered from the wreck in a damaged condition, and afterwards delivered to him in Philadelphia. Two of the cases were entirely lost, while the two cases puton board the City of Manchester arrived in due season. The libellant's parol evidence related to the amount of damage which he had sustained. The testimony of the respondents was intended to show that a usage prevailed at Liverpool to ship goods promptly as they were received, without reference to any particular steamship.

The cause was argued by *David Webster* and *Henry M. Phillips*, for the libellants, and by *J. Murray Rush*, for the respondents.

Grier, J. — The respondents represent the "Liverpool and Philadelphia Steamship Company," who, by their bill of lading of 28th of August, 1854, acknowledged the receipt of eighteen cases of merchandise shipped on board their steamship Shamrock, to be conveyed to Liverpool, and to be there transhipped on board the Liverpool and Philadelphia steamship City of Manchester, or other steamship appointed to sail for Philadelphia on the 6th of September,

and failing shipment by her, then by the first steamship sailing after that date for Philadelphia. To be delivered in good order to libellant, Bazin, (the act of God, Queen's enemies, pirates, restraints of princes and rulers, fire at sea or on shore, accidents from machinery, boilers, steam, or other accidents of the seas, rivers, and steam navigation, of whatever nature or kind soever excepted.)

The libellant demands damages for non-delivery.

The answer admits the receipt of the goods according to bill of lading.

It alleges that the reason the steamship City of Manchester was specially named was because it was believed she would be the first steamer to sail after the arrival of libellant's goods. But, as the goods arrived at Liverpool before the departure of the City of Philadelphia, on the 30th of August, sixteen of the said eighteen cases were put on board of her. That the respondents considered it their duty, and it was the custom of the trade to dispatch goods received by the first opportunity. That the City of Philadelphia was in all respects safe, sound, and seaworthy, &c., &c. That she proceeded safely till 7th of September, when she was wrecked off Cape Race; a part of the cargo was saved from the wreck and brought to Philadelphia. That fourteen of the sixteen packages were delivered to the libellant.

It is objected by respondents' counsel that "the contract set forth by the libellant is an agreement preliminary to a maritime contract, and not within the maritime jurisdiction of this court."

But this objection cannot be supported. It is a bill of lading by which defendants bind themselves to carry goods received at Havre, and deliver them at Philadelphia. It is a contract for a maritime service, and it would be difficult to say what is a maritime contract, if this be not one. If it had been merely an agreement by the respondents with the libellant that, if he would send goods by their line, they would receive and forward them for a certain consideration, and the breach of the agreement was in refusing to receive or transport the libellant's goods at all, or for the consideration stipulated, then the objection of the respondents would apply. But when the respondents have received the goods on board their vessel, and given a bill of lading to transport them across the ocean, it can hardly be called a preliminary agreement to a maritime contract, and not the contract itself.

The case presents these two questions on the merits.

1st. Are the respondents liable?

2d. If so, what is the rule of damages, and their amount how ascertained?

The reason given by the answer for naming the City of Manchester in the contract, may possibly have been the true one; or it may be as alleged in the libel, that the libellant "directed his agent in France to send his goods by the City of Manchester," which was advertised to sail on the 6th of September, because he knew her to be a safe and reliable vessel, and under skilful management. But we need not search for any reason. "*Stet pro ratione voluntas.*" The libellant may, in fact, have had no better reason than that he believed the City of Manchester to be a lucky vessel; or he may very justly have preferred a tried boat and crew to a new iron steamer, whose officer or whose compass had not been tested by a trip across the ocean. Reason or no reason, he had a right to have his contract fulfilled according to its stipulations; and the result has shown that if such had been the case, his goods would have arrived safely. If the goods had been sent by the Manchester, the risks excepted in the bill of lading would have been borne by the libellant. For them he was his own insurer, and the carrier for those not excepted. If the carrier changes the vessel and the time of dispatching the goods, he has substituted different risks from those stipulated by the parties, and should be held as insurer against all loss, from whatsoever cause. The loss to the libellant is a result of the defendant's breach of contract.

But, assuming that the libellant had no good reason for desiring his goods to be sent by a particular vessel, and that the insertion of the name of the Manchester was merely *pro forma*, to fill up the usual blanks in a printed bill of lading, is there any evidence whatever that the goods were not injured in consequence of any accident excepted in the bill of lading?

The respondents aver that the ship was seaworthy in every way; the libellant denies the fact in his replication.

The testimony of the captain shows his steamboat to have been new, made of iron, tight and stanch, well rigged and manned. The only account given of the loss of the vessel, was as follows: "She struck the point of Cape Race; up to that time she continued perfectly seaworthy. If she had not struck, at the average of our rate we should have been

in Philadelphia in five days. The steamer was wrecked. We backed off the Point of Cape Race, and run her on shore to save the lives of the passengers, and keep her from sinking. There was no tempest. She struck in a dense fog; the sinking of the vessel and the damage done, resulted from her striking the Cape."

Here then we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness both seem to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an "*accident* of the sea" within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass; and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer, who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape, or a continent, has neither the skill nor the prudence to be entrusted with such a command; and for want of such an officer the vessel is not seaworthy.

The loss of the goods committed to a carrier and in possession of his servants, puts the burthen of proof on him, to show how it took place, and that it was not by their fault, but in consequence of some of the unavoidable accidents excepted in the bill of lading. The respondents have not alleged or proved any one fact tending to relieve them from responsibility. That a steamboat has been either ignorantly, carelessly, or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier. Yet for anything that appears, such is the case before us. If there any circumstances tending to lead to a contrary conclusion, they are not in evidence in the case.

II. The rule of damages in these cases is, that the carrier shall pay for goods not delivered, their net value at the port of delivery. He is not liable for any speculation or possible profits which the owner might have anticipated in his peculiar business. Thus, suppose the carrier liable for

non-delivery of one hundred barrels of flour at Philadelphia on a given day, and on that day flour is worth $5 a barrel, the amount of the owner's damage is clearly just $500, because he could have bought one hundred barrels of flour and supplied his loss for $500. The owner cannot be allowed to show that he was a baker, and could in a few weeks have cleared $10 dollars a barrel by manufacturing his flour into bread. The sum of money which represented the net value of the lost articles, with interest, till paid, is all that can be recovered from the carrier when goods have been lost in the course of transportation. And as the owner would have paid freight as a deduction from the net value of his flour, so when the carrier pays its value, he will be entitled to have his freight deducted, if it has not been paid. In all cases when the article to be delivered has a definite market value, the application of the rule is without any difficulty.

The libellant keeps a variety store in Philadelphia. The eighteen cases contained a selection of ten thousand articles of perfumery, &c., &c., to be found only in such shops. They are retailed generally at one hundred per cent. profit on the original cost in Paris. But few, if any of these numerous trifles have any known wholesale or market value in Philadelphia, nor could the libellant have supplied himself with the lost goods most probably in the Philadelphia market at any reasonable price. How, then, are we to arrive at a rule of damages to ascertain the amount of loss to libellant for the non-delivery of his articles? Certainly not as contended by his counsel, by taking the original cost, adding expenses and charges of transportation, seventy-five per cent. "for loss of anticipated profits."

If these articles, like most other goods and wares, had a known value in market here, for which they could be purchased, the original cost and charges of transportation would have nothing to do with the calculation. But as such is not the case in the present instance, we must inquire what was the original cost and what the charges of transportation, &c., in order to arrive at their value here; or more properly, what would it cost to get other goods of precisely the same value in place of those lost. Now, we may assume, (as nothing is pretended to the contrary,) that a bill for the very same sort of articles which Mr. Bazin has purchased could be filled in Paris for the same sum of money in less than sixty days, every article not delivered

here by the carrier, could be put in Mr. Bazin's shop for the same price which he has paid for them. But he will have lost only the interest of his money for sixty days longer. How much profit he might have made by retailing them, or what the amount of "anticipated business profits," being matters not capable of certain ascertainment, cannot make a part of the consideration. Legal interest is all that the law knows as the damage for the detention of money. As the goods, therefore, have no market value here, and could not be purchased in our market, their value must be ascertained by adding costs and charges, and sixty days interest on this sum. From this amount deduct freight, which is unpaid, and add interest on the balance, till judgment.

District Court of the United States. District of Massachusetts, May, 1857.

ABRAHAM RICH *v.* W. F. PARROTT, ET AL.

IN ADMIRALTY.

The respondents, by charter-party, hired a vessel of the libellant, for a voyage from Boston to Calcutta and back, and bound themselves to furnish a full cargo at Calcutta, including a sufficient quantity of saltpetre, or its equivalent, for ballast. When the vessel arrived at Calcutta, the exportation of saltpetre to America was prohibited, and the respondents offered to furnish the master other goods sufficient for ballast. *Held*, that in respect to the mode in which the vessel should be loaded, the master was the agent for the libellant, who could not, therefore, claim damages of the respondents, if it should appear that more stone ballast was retained in the vessel than was necessary for dunnage.

THE facts of the case appear in the opinion of the court.

SPRAGUE, J. — This is a cause of contract. In September, 1855, the libellant, by charter-party, let to freight the ship Martha to the respondent, for a voyage from Boston to Calcutta and back. The respondents were bound to furnish a full cargo at Calcutta and pay freight therefor, at the rate of fifteen dollars per ton. Among other things it was stipulated that the respondent should furnish "sufficient saltpetre, or its equivalent, for ballast." The voyage was made, and the ship returned with a cargo to Boston. The libellant alleges that the respondents did not furnish

sufficient saltpetre, or its equivalent, for ballast, by reason whereof he was compelled to take ninety-two tons of stone ballast, and thereby lost the freight on that number of tons of saltpetre or other equivalent merchandise. In answer to this claim, the respondents admit that no saltpetre was furnished; but allege: First, that sufficient equivalent merchandise was furnished for ballast, and actually received and taken on board as cargo. Second, that if sufficient equivalent merchandise for ballast was not received by the libellant, it was through the neglect and fault of the libellant, and not of the respondents. Third, that the stone ballast, in the homeward voyage, performed the office of dunnage, and occupied no space that could have been filled either by saltpetre or other merchandise, and did not displace any cargo.

By the true construction of the charter-party, the libellant was bound to receive such goods as the respondents should offer, it being at their option what kind to furnish under certain limitations, only three of which have any application to the present controversy, viz: that the goods should be such as would fill the vessel; and secondly, such as would load the vessel to a fair and reasonable draft; and thirdly, sufficient saltpetre, or its equivalent, for ballast. It appears that the exportation of saltpetre in America vessels was then prohibited, owing to the war in Europe, and that the libellant demanded sugar or rice as equivalent for ballast, which the respondents refused to furnish. But they did furnish various articles, and among them linseed, buffalo hides, cowhides, gunny cloth, indigo, goatskins; and were ready to furnish a greater quantity of any or all these articles, if the master had requested it.

The master was the agent of the libellant. The storage of the cargo belonged to him, and not to the respondents. By the true construction of the charter-party he had a right to require such merchandise as should load the vessel full, and to a fair and reasonable draft, and be sufficient for ballast. Subject to these and certain other conditions, not necessary to be here noticed, it was at the option of the shipper what goods to furnish, and it was the duty of the carrier to receive such as he should offer. It is insisted by the respondents, that the cargo which was actually brought home fulfilled all these conditions, and would, if properly stored, have preceded the necessity of any stone

for ballast. On this point the evidence is conflicting, but I think it preponderates in favor of the respondents. But if this be doubtful, it is clear that with the same kinds of goods in different quantities and proportions, the vessel might have been properly loaded, and within the requisitions of the charter-party, without any other ballast. It appears by the libellant's own testimony, that a part of the heavy goods were put between decks, and some of the light goods in the lower hold. It was for the master of the ship, and not for the respondent, to know her construction and capacity, and where the different articles of merchandise should be placed and how proportioned. And the respondents being ready to furnish goods which would fill the ship to a fair and reasonable draft and ballast her, it was incumbent upon the master to make known to the respondents what proportion and quantities of the several articles would be necessary to accomplish that purpose; and if he omitted to make that requisition, the consequence of such neglect must fall upon his principal, and not upon the shipper.

The master testified that the consignee and agents of the respondents refused to comply with his requisition for sugar or rice for ballast, and told him he must keep in his stone ballast, and settle the matter in Boston. And it is insisted that this binds the respondents. But this declaration was evidently made upon the supposition that the goods which he had to offer could not be made to perform the office of ballast, and as he could not furnish saltpetre, sugar or rice, the only alternative was to take stone, and it could not have been intended to release the master from his obligation to receive any goods which fulfilled the conditions of the contract. Nor does it appear that the consignee had any authority to do so. He was employed to furnish cargo under the charter-party. But there is no evidence that he was authorized to waive or change any of its stipulations, or make any agreement as to the manner in which the ship should be loaded or ballasted. I think the third ground of the defence also is sustained by the evidence, that is, that the stone in the bottom of the vessel occupied no more space than was necessary to be devoted to dunnage; it is also quite certain that the cargo that was on board might have been so stowed as to dispense with a considerable part of the stone, if not wanted for dunnage, and thus the stone would have occupied no space where cargo could have been placed, for a part of the heavy goods were in

fact stowed between decks, and a part of the light in the lower hold. The defence is sustained, and the libel must be dismissed.

Samuel E. Guild, for the libellant.

C. P. Curtis, jr., for the respondents.

Superior Court of Suffolk County.

Before the full bench. May Term, 1856.

Reported by L. H. Boutell, Esq.

National Bank *v.* Eliot Bank.

Money on deposit at a bank creates the relation of debtor or creditor, not of depositor and depositary.

The holder of a bank check cannot maintain an action in his own name against the bank for refusing to pay the same, though it has funds of the drawer on deposit sufficient therefor.

Abbott, J., dissenting.

This action was brought by the plaintiff bank as the bearer and owner of a certain check, drawn by Bacon, Price & Co., on the defendant bank, a copy of which is as follows:

Eliot Bank, *Boston, Jan.* 22, 1856.

Pay to 348, or bearer, Fourteen Hundred Dollars.

To the Cashier. Bacon, Price & Co.

It appeared in evidence that Bacon, Price & Co. were depositors at the Eliot bank, and that said bank had been in the habit of receiving and paying the checks of that firm for some time previous to the date of this suit; — that the said check was presented for payment on the day of its date, and that the defendant bank then had the sum of $2009.67 to the credit of Bacon, Price & Co. in their deposit account, but refused to pay said check. It also appeared that at the time of the presentment of said check, the Eliot Bank had certain promissory notes, signed by Whittier & Warren, who had failed, and endorsed by Bacon, Price & Co., not then due, and for a greater amount

than the sum to the credit of Bacon, Price & Co. in their deposit account.

The case was taken from the jury and argued before the full court.

Oliver Stevens, for plaintiff.

Codman and *Johnson*, for defendant.

1. There is no privity between a bank and the holder of an unaccepted check. Money on deposit at a bank creates the relation of creditor and debtor, not of depositor and depositary. The rights of the check holder are subject to all equities between the bank and the depositor, and therefore the holder cannot maintain an action in his own name.

2. This action cannot be maintained upon the doctrine of implied acceptances as held in this country. For, first, an acceptance, whether express or implied, must give the holder of a bill an absolute right against the drawee, independent of equities between the drawee and drawer; secondly, it must be of an existing bill; and thirdly, in this State it must be in writing.

3. Nor does this case come within the rule that where A. gives money to B. to pay to C., C. shall have an action against B. in his own name. For the law raises a promise, from the fact of having money in hand belonging to another, to pay it to that other; but if the payment is to be made at some future time, subject, however, to all equities between A. and B., if any shall exist, the law cannot raise a promise in favor of C. from the fact of property in the hands of B. which belongs to C., for *non constat* that there is any such property.

In support of these points various authorities were cited, which appear in the opinion of the majority of the court, which was delivered by

Huntington, J. — In this case the plaintiff corporation was the holder of a check, drawn in common form by the defendant corporation, and seasonably presented the same at the counter of the Eliot Bank for payment. Payment and acceptance were refused, and the plaintiff, as holder, seeks to maintain this action for such refusal. Whether the drawers would have a remedy in their own names, is not the point in dispute. Can the payee or holder of the check intervene and in his own name hold the bank upon which it is drawn? As this question lies at the foundation of the suit, it is not now necessary to take notice of

the other facts found or agreed between the parties, — demand, protest, the state of accounts, and dealings by the respective banks.

The authorities, so far as they speak of the precise nature of the contract between the bank and its customer in common deposits, treat it as in the nature of a loan, and the relation arising as that of debtor and creditor, not a *deposition* merely. The bank opens an account of debt and credit. It employs the money for its own use, — it becomes part of its general assets. No third party is named or known, and the bank is liable to answer the checks of the customer to that amount. *Carr* v. *Carr*, 1 Merivale, 541; *Devaynes* v. *Noble*, Ibid. 568; *Commercial Bank of Albany* v. *Hughes*, 17 Wend. 100; *Sims* v. *Bond*, 2 Nev. & Man., 608. In this last case, A., in his own name, deposited with C., his banker, funds which were the proceeds of a partnership sale of partnership effects, which belonged to A., together with one B. The question was, whether in a suit against the banker for the money so deposited by A., B. could be joined with A., and it was held that he could not, because, say the court, there was no privity of contract with the partners, A. and B., and it is added: "Sums which are paid to the credit of a customer with a banker, though usually called deposits, are in truth, loans, by the customer to the banker, and plaintiffs who seek to recover the balance of such an account, must prove that the loans were made by them." It is obvious that the plaintiffs, in the case at bar, could not recover on this ground.

In Byles on Bills, p. 16, *note*, the author seems to deny that the holder of an unpaid check has an equitable claim on the drawee, even in bankruptcy, so as to prove under the *fiat* as assignee of a chose in action, and he cites a case where commissioners in bankruptcy, after taking time to consider, disallowed the claims of several holders of checks on the bankrupts, who claimed to prove as equitable assignees of choses in action.

The contract between the bank and the customer rests on an implied obligation, one and entire, between the parties only, and not for the benefit of any third person. It is well settled that an order or draft for a part only of the debt or liability of the drawee, does not, against his consent, amount to an assignment of any portion of the debt or liability, and does not authorize the institution of a suit in the name of the assignee, for the whole or any part, be-

cause a debtor is not to have his responsibilities so far varied as to subject him to distinct demands on the part of several persons, when his contract was one and entire. *Gibson* v. *Cook*, 20 Pick. 15.

In *Bullard* v. *Randall & Tr.*, 1 Gray, 606, the judgment of the court proceeded on the ground that a check must not only be presented, but accepted by the bank, and charged, in order to avail the holder; and that a verbal assent of the cashier, away from the counter of the bank, cannot avail him. If the bank, therefore, as in the case at bar, refuse to accept and pay, it seems that the holder has nothing of which he can "avail" himself as against the bank, and can maintain no action in his own name. In *Taylor* v. *Wilson*, 11 Met. 52, it was held that if a creditor, in payment of a debt, take a check upon a bank, and the bank fail, or the check be dishonored, the check is mere evidence of a debt due from the drawer, not a payment, and the creditor's remedies against the drawer remain entire, if he is not guilty of laches.

The usage of banks, in giving what are known as certificates of deposit, where third persons are intended to have the benefit of money thus passed to the banks, in which the money is expressly stated to be payable to the order of such third person on the return of the certificate, throws some light on the nature of the contract in cases of common deposits, where no third party is recognized in terms. It is not the custom to present checks for mere acceptance, or to give notice, or for the holder to sue the bank upon a refusal to accept. If an action can be sustained by the holder of a check against the bank, under the circumstances of this case, it is singular that so far as our search has reached, no precedent of the sort can be found in the books.

On the other hand, there are dicta of judges, and of textbooks, and analogies of the law, to the effect that such an action cannot be sustained.

In *Bellamy* v. *Majoribanks*, 8 E. L. & Eq. Rep. 517, where the question was as to the effect of "crossing checks," the Attorney General, Cockburn, says, in the course of his argument, that "the banker owes no duty to the holder, and is liable to no action at his suit, if the check is not honored." This was not controverted by the opposing counsel. But what is of more weight, Baron Parke, in his opinion in the same case, treats it as a familiar, well settled

principle, and says, "the lawful holder of the check is of necessity entitled to receive payment of it. He could not sue the drawee, unless the drawee had accepted the check, a practice not usual, but he could sue the drawer for non-payment, if he was the holder for value."

When, therefore, in *Marzetti* v. *Williams*, 1 B. & Ad. 415, it was held that a banker was liable in an action of tort or contract to the customer for refusing to pay a check when in funds, though no actual damage was sustained, on the ground that the contract was to pay all drafts presented, in a reasonable time after receiving the money, it is clear that the court did not mean to decide that the banker was also liable to the holder of the check, or under a contract with him.

The consideration that he was not liable to the holder, would seem to be a good reason why he should be liable over to the drawer in tort or contract.

In *Chapman* v. *White*, 2 Selden, 412, it is said the drawer owes no duty to the holder of a check, until after it is accepted. The right of the depositor is a chose in action. The draft or check of the depositor does not transfer the debt, or a lien upon it, to a third person without the assent of the depositary, and *Dykers* v. *Leather Man. New Bank*, 11 Paige, 616, is cited.

In Chitty on Bills, under the head of "Acceptances," p. 280, 281, it is said, a banker is liable to an action by the customer, if he should refuse, having sufficient money in hand to honor the check of his customer, but that in case of refusal, the holder has not any remedy at law against the drawee or banker on the funds in his hands. The law, however, says the author, is otherwise in France.

He adds, as to bills of exchange, that if the drawee, by course of business, has impliedly engaged to accept, and afterwards refuses to perform, then he is liable to the drawer, but not to any other party. Even this has not been adopted as a rule of law in this country. To introduce it here now, as to checks, would be introducing a novel principle, multiplying the distinctions and rules of mercantile law. There is good authority for holding that an express precedent promise to accept a draft, to be afterwards drawn, is a chose in action not negotiable or assignable so as to enable the assignee to maintain an action in his own name.

Chancellor Kent says, it seems to be a little difficult to understand how the indorsee of a bill, subsequently drawn,

can charge the drawee with acceptance by virtue of such a preceding promise, which is not of itself assignable, and is strictly no part of the negotiable contract. *McEvers* v. *Mason*, 10 J. R. 215; *Ontario Bank* v. *Worthington*, 12 Wend. 598. This reasoning applies with quite as much force to a check "subsequently drawn," as to an ordinary bill of exchange. That such a known legal distinction exists between checks and bills of exchange would be a difficult proposition to support upon any decided cases.

A further inquiry arises, whether the contract between the customer and banker can be brought within the principle, now well established, and which has been applied to a certain class of cases to be found in the books, viz. that if A. receives money of B., to the use of C., though there is no communication between A. and C., and no privity other than what arises from the duty of paying, an action will lie in behalf of C. against A. In other words, that when one person, for a valuable consideration, engages with another by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.

This principle has been applied in this State, in *Hall* v. *Marston*, 17 Mass. 575; in *Arnold* v. *Lyman*, Ibid. 400; and in *Carnegie*, v. *Morrison*, 2 Met. 402. In these cases, however, and in the cases cited by the court in giving the opinion in 2 Metcalf, it will be found, that the third party, seeking to enforce the contract, is particularly designated and named in the contract, that the person who is to receive the benefit is specifically pointed out.

In *Hall* v. *Marston*, the defendant was specially directed, when he received the remittance, to pay over a certain sum named, to the plaintiff, and the court held that he was to be charged as an agent, who had accepted the agency, and that he could not follow his directions as to receiving the money, and disobey them as to the application of it.

In *Arnold* v. *Lyman*, the defendant, Lyman, took an assignment of the notes and goods of one Hutchins, and in consideration promised him to pay certain liabilities due to himself, and also a note of the plaintiff, who was mentioned by name. The court held that the plaintiff might sue the assignee, defendant, on the ground that the promise might be considered as legally made to the several creditors

named in the assignment, because the promise was to pay certain particular debts, and that therefore, it might be treated as a promise to the creditors, and that bringing the action by the plaintiff, to whom a note was due, was an assent to the promise, it being for his interest that it was made. But in the case of a bank deposit or loan, like that at bar, no particular debts are named; no particular creditors; and there is no appropriation of the moneys at the time of the deposit.

In *Carnegie* v. *Morrison*, the third party, plaintiff, named in the letter of credit written by the defendants, through which the defendant was held liable as on a contract made with the plaintiff, though the letter was merely addressed to a person who owed the plaintiffs, and procured the letter of credit for their benefit.

The contract between the bank and its customer in deposits, does not therefore seem to come within the letter or spirit of the principle and reasoning recognized in these cases of money received by A. from B. for the use of C., or for the benefit of a third person. To apply it to a loan or deposit, would seem to be forcing it into service for which it was never designed, and for which there is no precedent. Judgment must therefore be for defendant.

Abbott, J. — After the best consideration that I have been able to give to the question involved in this case, I have been unable to agree with the other members of the court in the conclusion at which they have arrived. Although, unfortunately, there are no adjudicated cases in England or this country, directly in point, I think a careful consideration of the principles applicable, and of decisions in analogous cases, will enable us to come to a satisfactory result, and one in accordance with the universal practice and understanding of the commercial and business community, and every member of it who may have occasion to give or take a bank check. It is certainly important to all that the respective rights and obligations of the holder and drawer of a banker's check should be settled and defined, so that upon a matter of such constant and often recurring importance as the law governing that class of securities there should be no doubt. The simple question presented in this case is, whether a bank or banker with whom a customer has deposited cash, to be drawn out upon his checks, is liable in a suit by the holder of a check who has presented it at a proper time and been re-

fused payment, although the drawee is in funds deposited for the purpose of being appropriated for such payments.

I think the law to be, that, if a holder of a bank check presents it at a proper time and demands payment, the bank possessing funds of the drawer deposited for the purpose of meeting checks to be drawn by him, and payment is refused, he can recover the amount of it in an action against the bank. What is the contract between the depositor and the bank? Beyond all question, simply this: In consideration that the depositor will let his cash remain with the bank, either with or without interest, as shall be agreed upon, until he wants it, they agree to pay it out in such sums as he shall draw checks for, to any persons who shall present such checks. This is the contract between the bank and its depositor in the ordinary course of business, as it is understood by the whole commercial community, and as it is defined by the law. The money is deposited for the convenience and safety of the customer, and the consideration to the bank for keeping and paying it out on checks is, that they have the use of it while thus deposited. The drawing of the check is in and of itself an appropriation of its amount, out of the funds in the banker's hands; and after notice of such appropriation neither the drawee nor the bank can withhold the funds so appropriated. *In re Brown*, 2 Story, 516; Story, on Pr. Notes, § 489; *Bœhm* v. *Stirling*, 7 Tenn. R. 429; 3 Kent's Com. 104, note *c*.

It is of no consequence, and does not alter the relation between the parties, that cash so taken is not held in specie, as a special deposit to be kept and returned in the same form as deposited; or that it amounts merely to a credit to the customer on the part of the bank, and goes into their general assets. The only important inquiry is upon what contract is the money taken, and does the bank, by taking it, assume and agree to pay on demand the checks of the customer to the holders who should present them? That such is the contract of the bank, cannot now be disputed. Indeed upon the strength of it, the courts have very properly held that where the banker refused to pay a check upon presentment, by mistake, supposing at the time he was not in funds, when, in fact, he was, the drawee could maintain an action of tort or contract, and recover nominal damages, though he could prove no actual injury. *Marzetti* v. *Williams*, 1 B. & Ad. 415; Chitty on Bills, 280, 281; *Harker* v. *Anderson*, 21 Wend. 379; *Little*

v. *The Phœnix Bank*, 2 Hill, 431; *Whitacre* v. *Bank of England*, 1 Cromp. Mees. & Ros. 741.

This is also a principle of law equally well settled by a series of authorities, as is the contract between the banker and his customer, which is applicable to the case in hand, and which, applied to that contract, seems to me decisive. It is this: — Whenever one person puts money into the hands of another to be paid to a third, or whenever one, for a good consideration, contracts with another that he will do some act for the benefit of a third person, the third person, in such case, can maintain an action in his own name against the person so receiving the money or making the provision for his benefit, although there was no privity of contract between them, being in fact perfect strangers. This has been settled in a great variety of cases, both in this State and elsewhere; as where A. paid B. money, with directions to pay it to C.; or where one, owing debts to various persons, assigned property to another, taking his written agreement to pay certain creditors of the assignor. 22 Am. Jur. 17; 2 Greenl. Ev. 109; *Arnold* v. *Lyman*, 17 Mass. 404; *Hall* v. *Marston*, 17 Mass. 575; *Felton* v. *Dickinson*, 10 Mass. 287; *Carnegie* v. *Morrison*, 2 Met. 402; *Fulton* v. *Poole*, T. Raymond, 302.

The objection that has been urged to a recovery by the plaintiffs, that where one owes another, and the creditor undertakes to assign a part of the debt, the debtor is not bound in law or equity to take notice of such assignment, has no weight, and is not even applicable to the case at bar. The reason given for the rule in that case is this, the debt being entire, the debtor cannot, against his consent, be made accountable to several debtors instead of one; he can well rely upon his contract, and say, I agreed to pay *one*, not *many*. This reason, and the only one given for it, does not apply in the case of the banker; because he has contracted with his customer that he would pay the funds in his hands to as many different persons, and in as many different parts, as the customer should order by his written checks. In the one case making the debtor liable to more than one, would be directly in conflict with his contract; and in the other, directly in accordance with its very terms.

We have then the contract of the banker with his customer who deposits money with him, that he will pay it upon the written checks of the depositor to the persons who shall present them; and also the well established principle of law, that whenever one promises another that

he will pay money, or do an act for the benefit of a third person, the third person may sue in his own name, although no consideration moved from him, and no contract was made between him and the person sued. Apply this clearly defined and authoritative rule to the contract between the banker and his customer, and will it not inure to the benefit of the holder of a check drawn by the depositor on the banker? How can such a conclusion be escaped? The banker promises the depositor to pay the person who may hold and present a check drawn by him, and on the strength of that promise the holder takes the check and presents it; why should he not maintain his action against the banker, on the ground that the latter has made a contract for his benefit, indeed to pay him money directly? It would be admitted that the case would be within the strict letter as well as the spirit of the rule, if the persons in whose favor checks were to be drawn, were named at the time of the deposit. Can the fact that the *cestui que use*, viz. the check holder, is not named, make any difference in principle? There are a great variety of contracts that are legal, and can be enforced by those who had no interest in them at their inception, as in the familiar case of a promise to pay a reward to any one who should restore lost or stolen property; or the still more familiar one of a promise to pay money to order or bearer, in either of which cases the contract might be enforced by an action in the name of one not *in esse* at the time of its inception.

But upon this point we are not without the aid of express authority, and that of the highest character. In the case of *Weston* v. *Barker*, 12 J. R. 276, a third person had assigned to the defendant certain demands, which were to be collected by him, and appropriated first to the payment of certain specific debts of the assignor, and the balance held subject to his order. This assignment was accepted by the defendant, and after he had collected the claims, the assignor ordered the defendant to account for the balance with the plaintiff, which the defendant refused to do. The court held, that although at the time the assignment was accepted, the plaintiff was not named, and although it was an agreement on the defendant's part, to pay to any person the assignor might order, still an action could be maintained against the defendant in the name of the payee of an order subsequently drawn. This case seems to me to be decisive of the objection that at the time of the banker's contract with his customer, the persons to whom the money

is to be paid, are not named. The contract is to pay to the customer's order, and when the order or check is drawn, the person to whom payment is to be made, becomes fixed and ascertained. To the same effect is the case of *Fenner* v. *Meares*, 2 Wm. Bl. 1269. And although the authority of this case has been somewhat questioned subsequently by Lords Kenyon and Ellenborough, it was not overruled, and I think the opinion given by Lord Chief Justice De Grey, and acquiesced in by the court, addresses itself to the judgment as being both too well considered, and too well founded upon principle, to be shaken by the hasty *dicta* of the learned judges before mentioned. Indeed, if these two cases are to be considered as authority, they would seem to go far towards settling the main question in this case.

It is true, undoubtedly, that there is no precedent exactly in point, to sustain the position here taken, but it is equally true that there is none directly in point against it. The boast of the common law is, that it is not necessary to provide in terms for every possible case that can arise out of the ever varying, and shifting, and almost innumerable relations subsisting between men engaged in commerce and business in a highly civilized community; but that it provides a system, a collection of general principles applicable to all cases, by which the rights and duties of each and all, growing out of such relations, may be established and defined. To refuse to apply a well established general principle to a new case that may arise, because there is no precedent for it, would be contrary to the policy of the law, and directly in conflict with the genius of the whole system.

The result to which I have come is, that a holder of a check, who presents it to the banker upon whom it is drawn, who is in funds on account of the drawee, and is refused payment, can maintain his action as well against the banker as the drawee. Such a rule would work no practical difficulty. On the contrary, no presentment for acceptance being necessary, and bankers being obliged to pay in the order in which checks are presented, it would add to the diligence of holders in collecting them, and increase confidence in a class of securities generally used and highly necessary in a business and commercial community.

March Term, 1857.

KNAPP *v.* GILLINGHAM.

After service of writ, the defendant tenders the amount of debt, which the plaintiff accepts, but also requires payment of costs, which is refused. *Held*, that the plaintiff might enter the suit and obtain judgment for costs.

ABBOTT, J. — This was an appeal from the Justices' Court. By the agreed facts it appears that after the action was commenced, and the writ served, the defendant tendered the plaintiff the debt demanded in the suit, but not the costs; that the plaintiff accepted the amount tendered, but not in full satisfaction of debt and costs, and demanded of the defendant payment of costs, which was refused. The action was then entered, for the purpose of recovering the costs due at the time of the tender. The question is, what judgment should be rendered under such circumstances. The tender was made under the Revised Stats. c. 100, section 15, which provides that a tender may be made after action brought, provided the whole sum due with legal costs up to that time be offered. Here the debt was tendered, but the costs withheld. Was the creditor obliged to refuse the money so offered for his debt, unless he gave up his claim for costs, or could he take the money in satisfaction of the debt, and proceed with the action to recover his costs? We think he was not obliged either to refuse the money when offered him, or to lose his costs already accrued. The defendant's right to make the tender when he did depended on the condition that he tendered costs as well as debt. It was his duty to pay the costs when he offered the debt; the one was as much due as the other; and if he did not do so he was in default, and should at least be compelled to pay what was due and owing from him. The statute under which the tender was made treats the costs as if they were as much due from the defendant as the debt itself. We think, therefore, that as all that was due was not tendered, the plaintiff can proceed with his action to recover that which it is agreed was due and payable, viz. the costs, and which were not paid. The general rule undoubtedly is that the plaintiff cannot recover costs without damages, the former being usually considered a mere incident to the latter, and dependent upon them. But in this case that reason does

not exist. On the contrary, the action was rightfully commenced, and the necessity for its prosecution was the refusal of the defendant to do what the law, which he undertook to avail himself of, required of him. We think judgment should be rendered for the plaintiff for costs.

L. T. Hall *v.* A. C. Rowe & Tr's.

Where partners are summoned as trustees, they are not entitled to separate costs.

May Term, 1857.

Frederick Cushing *v.* George W. Gerrish.

A note for $850.00 in sixty days, was unpaid at maturity. Whereupon a note for $800.00, of the date of the first one was given on four months, the plaintiff agreeing, if this was paid punctually, to give up his claim for the balance of the first note and the interest, viz. $58.00. At the same time defendant gave a note payable to plaintiff for $158.00, which was placed in the hands of a third party to be delivered to the plaintiff if the $800.00 was not paid at maturity. In a suit on the $158.00 note, it was *held*, That this note was in the nature of a penalty, and that the plaintiff could recover only $50.00, and interest.

The facts are stated in the opinion of the court, which was delivered by

Huntington, J. — The plaintiff held a note against the defendant for the sum of $850.00, given for a good consideration, payable in sixty days from October 25, 1855, which was not paid when it fell due. It was then agreed between them that the note should be renewed for sixty days upon the following terms and conditions. The defendant was to give his note for $800.00, dated back October 25, 1855, at four months; if this note of $800.00 was paid punctually when it matured, the plaintiff agreed to relinquish and give up to the defendant the balance of the note, and the interest, amounting together to $58.00; and the defendant agreed that if he did not pay the note of $800.00 when it fell due, he would pay the plaintiff the sum of $100.00. A note was thereupon made by the defendant for the sum of $158.00, being the two sums he agreed to pay, and this note was placed in the hands of a third person under a written agreement also dated back October 25, 1855, who gave a receipt stating that the note was to be given to the defendant if his note of even date for $800.00 was paid at maturity; if not paid at maturity,

the note of $158.00 was to be returned to the plaintiff. The $800.00 note was not paid at maturity, and the $158.00 note was accordingly delivered to the plaintiff, and is the note now in suit. The jury upon the trial, by direction of the court, returned a verdict for the sum of $58.00 and interest, and the question now submitted is whether the plaintiff is also entitled to recover the further sum of $100.00 and interest, and the decision of this court being by agreement made final, and the case itself being novel and peculiar and somewhat perplexing in some of its aspects, we have given it a full consideration.

The principal question argued before us was whether this note of $158.00 was given without consideration, that being the defence set up in the answer. We concur with the argument for the plaintiff that there was a good consideration for the note, both from the forbearance of the plaintiff, and the conditional relinquishment of fifty dollars and the interest, as provided in their agreement. These were both gain to the defendant, and damage or loss to the plaintiff, and either would constitute a good consideration.

But the case does not stop here. The note was given on a condition to be performed by the defendant. He was to pay the $800.00 note when it became due. If he failed to do this, the note now in suit was to be delivered to the plaintiff. True, this condition is not expressed on the face of the note, but it was contemporaneous with the other stipulation, and as the facts find, was made the subject of a "written agreement" between the parties. Looking at the note alone, it appears to be a note for a specified sum and for value. But it is an established rule of law that several instruments made at one time, and having relation to the same subject-matter, are to be construed together to show the true contract between the parties. *Makepeace* v. *Harvard College*, 10 Pick. 298; *Hunt* v. *Livermore*, 5 Pick. 395. And in connection with this rule, it may be added that the subject-matter of the contract may be inquired into so far as respects the situation of the parties, and the facts relating to the agreement, to ascertain the circumstances out of which the contract originated, and especially in regard to the *consideration*. *Hodges, Ex'r.* v. *King*, 7 Met. 583, 586. In this case the written agreement and the surrounding circumstances of the transaction are made part of the agreed statement.

The subject-matter of the contract was a note of $850.00

which had fallen due and remained unpaid. Time and forbearance was desired on one side, and sure payment at a future day on the other, and to effect this the plaintiff was willing to relinquish a part or give a certain sum. A contract for the payment of $950.00 on certain conditions was entered into, being for a sum larger than the original indebtedness by one hundred dollars. Was it not the leading intent of the parties, then, to secure the payment of the eight hundred dollars when due, or damages for non-performance beyond the real debt and interest? Could not the contract have been put into the form of a bond with a penalty, instead of the form it assumed, which should have substantially contained the same stipulations? Does not the written agreement deposited with the third party, together with the note, constitute a conditional contract, in effect? If so, there is a well settled principle applicable to the transaction which requires that the sum of one hundred dollars named in the contract should be treated as a penalty, and not as liquidated damages. It is this: — If an instrument provide that a larger sum shall be paid on the failure of a party to pay a less sum in the manner prescribed, the larger sum is a penalty and not liquidated damages, whatever may be the language used in describing it; or as the rule is stated by Chambre, J., in *Kemble* v. *Farren*, 6 Bing. 143, "when the payment of a smaller sum is secured by a larger, the sum agreed for must always be considered as a penalty." *Heard* v. *Bowers*, 23 Pick. 455, 462; *Astley* v. *Welden*, 2 B. & P. 346; *Daken* v. *Williams*, 17 Wend. 447, 455. In *Gray* v. *Crosby*, 18 J. R. 219, 226, it is said if liquidated damages were applicable to such a case, they would afford a sure protection against usury under the forms of law. In *Orr* v. *Churchill*, 1 H. Black. 227, the same principle is recognized, with the further remark of Ld. Loughborough, that though it may often happen that the damages sustained may be greater than the compensation recovered by way of interest, yet when money has a real rate of interest and value, a party is not to be compelled to pay more than that rate and value.

If the sum of one hundred dollars were to be held as stipulated damages in the case at bar, it would rank the contract between the plaintiff and defendant among that class of contracts which, though not treated as void by reason of illegality in the consideration, yet are regarded so far in the nature of wagers, and unconscionable, that courts will not aid in enforcing them. Nothing but the

element of forbearance, for instance, would rescue this contract from a bargain of wager or hazard, or a bet of a hundred dollars against fifty-eight that the note of $800.00 would be paid punctually at maturity. There are many cases somewhat analogous to this, where contracts and notes have been treated as in the nature of penalties in order to do effectual justice between parties, and avoid at the same time lending the sanction of the law to wagering or unconscionable contracts.

In *Merril* v. *Merril*, 15 Mass. 488, a note was made in common form for $50.00, with a condition subjoined that it should be void if the payer should have the use of a certain building so long as it stood, and the jury found a verdict for only $12.00 for a breach of the condition. The court held that the contract was in the nature of a mere penalty, and not for liquidated damages, and the verdict was sustained for twelve dollars only.

So in *Kellog* v. *Curtis, Ad'r. of one Stoddard*, 9 Pick. 534, which was an action on a promissory note for $150.00, the plaintiff had attached land which had been conveyed by one Knapp to Stoddard, on the ground that the conveyance was void for fraud. Knapp absconded, and the plaintiff and Stoddard, the defendant's intestate, made a written agreement to submit the claim between the plaintiff and Knapp to arbitrators, and each made a promissory note part of the same submission. The notes were deposited with one of the arbitrators to be delivered up to be enforced against the party who should fail to perform. Stoddard failed to perform, and his note was delivered to the plaintiff and this suit brought. The consideration of the note was shown to be the relinquishment of the plaintiff's attachment of the property. It was held that the relinquishment of the plaintiff's attachment was a sufficient consideration for the note of the defendant, but that the note was in the nature of a penalty, and that the measure of damages would be the same actually due to the plaintiff from Knapp, the absconding debtor, and not the amount for which the note was written.

Spencer v. *Tilden*, 5 Cowen, 144, was an action on a written contract not under seal, by which the defendant, in consideration of six cows and calves delivered by plaintiff, promised to pay the plaintiff $360.00, or deliver twelve cows and twelve calves in four years from the date. It appeared that the sum expressed was much beyond the value of the cows, and it was held that the contract was

in the nature of a penalty, and that the measure of the damages was the value of the cows and interest. The court in this case recognized an element peculiar to the case at bar, viz. that it was a contract by which the plaintiff might lose by a fall in the market value of the cows.

In *Buxton* v. *Wales*, 12 Mass. 365, a promise was made in writing by the defendant, on hiring a cow, to return her and a calf in a year, with six dollars in cash, and if not then delivered, to pay six dollars a year till delivered. The cow and calf were not returned at the end of the year, and the plaintiff claimed interest at six dollars a year till delivery, and interest after such delivery. But the court held that the agreement to pay at the rate of six dollars per annum, for the use of the cattle, in case they should not be returned at the end of the year was unconscionable, and interest was allowed on the value only, instead of on the sum of $100.00.

So in *Cutter* v. *Howe*, 8 Mass. 257, the plaintiff, in satisfaction of an execution against the defendant, took a note for a specified number of bushels of oats at 20 cents per bushel, the true value being from 33 to 37 cents per bushel, with a stipulation that if the debt was paid in thirty and sixty days, the plaintiff would indorse a dollar for every five bushels of oats, so that if the defendant had paid at the time stipulated he would only have paid the original debt without interest. The court treated the new note as security for the old debt, and held, that though it was not void for usury, because the defendant by meeting his payments would have only paid an honest debt, yet that the contract was unconscionable, and the damages were assessed for only so much as was fairly due.

Interest at the rate established by law, is the usual compensation allowed for the neglect or omission to pay money at the appointed time. Parties in their ordinary dealings, and courts in establishing the rule of damages adopt this as affording adequate compensation for the non-payment of money when it falls due. If the plaintiff is made whole in this regard, he is indemnified in the eye of the law, and if he would recover other special damage, or a specified sum as specific and stipulated damages, he should prove such damage to have been actually sustained, and also take his case out of that class known as wagering, unconscionable, and against the policy of the law.

The provisions of Rev. Sts. c. 100, §§ 8 and 9, afford some guide as to the construction of the contract be-

tween these parties. It is there provided that in all actions brought to recover a penalty for the non-performance of any covenant, contract, or agreement, the court shall award execution for so much only of the penal sum as shall then be due and payable in equity and good conscience for the non-performance of the contract, to be ascertained by court or jury. Though the contract in the case at bar is not thus written in form, yet it partakes so far of its nature that we may safely recur to these provisions, and to the intent of the legislature in contracts of so analogous a character. It is not necessary in the case under consideration to decide that the contract is a contract for a penalty, within the terms of the sections cited, or that it is essentially usurious in its character, or that it is so far unconscionable as to be void on that account, or that it is a wagering contract, and therefore not to be enforced. But inasmuch as the two notes taken together constituted a contract for the payment of a smaller sum by a much larger sum, viz. $850.00 by $950.00 and interest; and inasmuch as holding the sum of one hundred dollars to be liquidated damages would taint the stipulations of the parties with wagering, unconscionable, and usurious elements, and inasmuch as interest is the usual compensation given by the law as damages for the non-fulfilment of money contracts, we cannot but hold the note in suit to be in the nature of a penalty, upon which nothing can be recovered beyond the sum of fifty dollars, the balance of the former note, and interest; and we think the authorities and cases cited afford safe and sure principles for the determination of the case submitted.

Judgment on the verdict.

G. H. Preston, for plaintiff.

G. A. Gerrish, for defendant.

Cases in New York.

Superior Court of the City of New York. General Term, February, 1857.

Before Duer, Bosworth, and Woodruff, JJ.

Colegrove *v.* Harlem R. R. Company & New Haven R. R. Company.

Joinder of parties — Liabilities of railroad corporations.

At about six o'clock on the morning of November 22, 1834, a passenger train of the Harlem railroad company, on its way from White Plains to the City of New York, overtook and ran into a freight train of the New Haven railroad company, at or near fifty-eighth street in the said city. The Harlem company owned the road, but allowed the New Haven company to run their cars on it from the junction at Williams's bridge to the city. The New Haven freight train was due in New York the night before the collision, but had been unavoidably delayed. The plaintiff was a commuter on the Harlem road, and got on, as usual, at the Harlem depot, in one hundred and twenty-fifth street. He did not enter the car at all, but was standing at the time of the collision on the rear platform of the first passenger car. His leg was broken by the collision, and he joined both companies as defendants in the present action for damages. The jury found that both companies were guilty of negligence; in other words, that the negligence of both concurred to produce the collision, which caused the injury.

By the Court — Bosworth, J. The counsel for the New Haven railroad company insists that no action will lie against the defendants, jointly, as the negligence of each was an independent act, or omission, of its own; that to maintain such an action, a single act in furtherance of a common purpose, or a single omission of duty, which was in fact, joint, must be shown.

In this case, it is impossible to ascertain what portion of the injury was caused by the negligence of one defendant, and what portion by that of the other. The negligence of each co-operated with that of the other, and the concurring and contributory negligence of both, was the direct and immediate and sole cause of the collision; or in other words, caused the injury. . . . . The injury was caused by a single act; it was caused, directly, by the joint action of the two, not by action had in pursuance of a common intent to cause a collision, but by action to which each was in fact a party. . . . . In a case like the present, and on such facts as have been proved in it, I think it may be said that the collision, and not the mere negligence of the defendants, is the cause of

action and ground of the defendant's liability. When a person is directly injured by the forcible act of another, trespass for the forcible act is the proper remedy, to recover the damages caused by it. The forcible act and consequent injury, constitute the cause of action. It is immaterial, so far as the question of liability is concerned, whether it was wilful, unintentional, or the result of negligence. It is enough, so far as the plaintiff's right to recover is concerned, that it cannot be justified. Whether it was wilful or unintentional, may affect the measure of damages, but does not enter into the ground or reason of the defendant's liability. *Leame* v. *Bray*, 3 East, 599; 7 Taunt. 698; *Wakeman* v. *Robinson*, 1 Bing. 213; *Blinn* v. *Campbell*, 14 J. R. 432; *Percival* v. *Hickey*, 18 J. R. 257. See also 19 J. R. 381, and 10 Wend. 654. . . . . The collision being the act of the two companies, and that act being forcible and without anything to justify it, and the plaintiff having been injured directly by it, the defendants, although corporations, being liable for it, may be sued jointly as well as natural persons. (See 1 Denio, 495; 17 Wend. 562; 7 Cowen, 485; 11 Wend. 539; 7 Mass. 169.)

Again, the counsel for the New Haven company insists that, inasmuch as the jury have found that the negligence of the Harlem company concurred with that of the New Haven company to produce the collision, so that the former could not maintain an action against the latter, to recover damages resulting from the collision, the plaintiff is equally precluded from recovering for any injury inflicted on himself on the ground, that, as between the plaintiff and the New Haven company, the car of the Harlem company was the plaintiff's carriage, and the negligence of that company for all the purposes of this action, is to be treated as his negligence. The counsel cites, in support of this proposition, 8 M. G. & S. 116, and Ibid. 123. . . . . In point of fact, the plaintiff had no more right or power of control over the one company than over the other. Any fiction of law, which imputes to him the negligence of the company in the cars of which he was a passenger, is a satire upon its pretensions to administer justice, according to the truth of the case, as disclosed by the facts which the evidence has established. It will not be denied, that if any person, not a passenger in the cars of any company, was injured by the negligence of the latter, that such negligence would not be imputed to any one being a passenger at the time, in any such sense, as to subject him to any liability to the injured party. Why should it be imputed to him, so as to deprive him of a right to redress against another company for the negligence of the latter, which right would have been indisputable, if he had not been a passenger in the cars of either company? (*Thomas* v. *Winchester*, 2 Seld. 397–410.)

. . . . . .

Again, the jury found that the Harlem company had caused regulations prohibiting passengers from standing upon the platform of the cars to be printed, that the plaintiff knew of those regulati

but that none were posted up inside of the passenger cars of this train.

The statute itself does not prevent a plaintiff from recovering, merely because he stood on the platform of the car when he was injured, unless printed regulations were, at the time, posted up in a conspicuous place inside of the passenger cars, then in the train; nor even in that case, unless sufficient room was proved inside the passenger cars for the proper accommodation of the passengers. Laws of 1850, p. 234. If the plaintiff's right to recover of the Harlem company is barred by the fact that he stood upon the platform, it is not because the statute creates a bar. Neither does the statute create an immunity, which would not otherwise exist, to the negligence by which a passenger is injured, unless it be the negligence of the company in the cars of which he is a passenger. The statute is penal in its nature, and so far as it adds one to any defence supported by the rules of the common law, and adds a defence which, under those rules, would not exist, it works a forfeiture of the right to be redressed for a wrong, on a rule of decision not warranted by the principles of the common law. Such a statute should not, by construction, be extended to cases for which it does not provide. There should be judgment for the plaintiff on the verdict.

WOODRUFF, J., dissenting. . . . . A fundamental principle lies at the foundation of all joint liability, and that principle is, that each of the parties charged is liable for the act or default of the other. This is no more and no less true in reference to joint liability in actions *ex contractu*, than in actions *ex delicto*. In the former, the parties are liable upon the same grounds, and for or in respect to the identical cause, and to the same extent. And in actions *ex delicto*, it is of the essence of joint liability, that the acts or defaults of each defendant are imputed to the other as effectually for all purposes, as if they were the acts or defaults of himself, and the liability of each for the acts or defaults of the other, enters not merely into the extent of the liability of each, but into the very basis and ground of such liability. . . . . .

Here the ground of the liability of each party being negligence, each is liable for the fault of its own servants, and only for such fault. The companies were acting wholly independently of each other. They were not discharging any common obligation to the plaintiff. They violated no common duty.

The fallacy in the claim that the liability is joint, results from regarding the collision, as the ground upon which the defendants are to be charged. It is not in respect of the collision which is itself a consequence, but in respect of the negligence that caused a collision, that either are liable. The *culpa causans* is separate in respect to each. . . . . I can understand how a man may be properly responsible for the negligence of his own servant, and for all its consequences; but that the coincidence of that negligence with the

negligence of another man's servant, should make him responsible for the negligence of the latter, as if the action be joint he must be, I do not understand and cannot concede. . . . . I cannot concur in the opinion that the judge was correct in charging that "the negligence of a plaintiff that goes to excuse the defendants must be such negligence that contributed to the accident that caused the injury."

In another form the proposition is stated thus: "The general rule is, that where a party by his own negligence, contributes to bring about the occurrence, by which the injury is effected, he cannot recover;" and lest the meaning of "occurrence" should be misunderstood in this instruction, it is added by way of explicit direction: "Standing on the platform of the car could in itself have had no effect in producing the collision by which the injury was effected; of itself, therefore, it would be no difference to the company in case of an accident occurring." By this the jury were given to understand, that however gross the negligence of a person may be in exposing himself to injury, if that negligence does not contribute to the other cause of injury, it is no bar to the plaintiff's recovery. . . . . I apprehend the inquiry is whether his injury is attributable to his own carelessness; whether his negligence contributed to his hurt. . . . . The plaintiff here says, and the charge adopts his claim; no matter how negligent I was, if there had been no collision, I should not have been hurt, and I did nothing tending to produce a collision. The New Haven railroad company may retort with equal plausibility; no matter how negligent we were, if you had not been upon the platform you would have sustained no damage, and we in no wise consented nor contributed of your needless exposure to injury.

The causes of this injury are three-fold. If it was an act of negligence in the plaintiff to ride upon the platform, there were three parties contributing to the injury. The injury may with equal propriety be said to be the consequence of the negligence of either, and it was clearly the result of all combined. (See 17 Wendell, 562; 1 Denio, 495; 2 Connecticut Rep. 206; 2 Vermont Rep. 9; 1 Duer, 571.)

John Graham, for plaintiff.

William Curtis Noyes, for the New Haven company.

Charles W. Sandford, for the Harlem company.

General Term. April, 1857.

Present: HOFFMAN, SLOSSON, and WOODRUFF, JJ.

DAVISON *v.* SILAS SEYMOUR and A. C. MORTON, survivors of H. C. SEYMOUR and C. E. MATHER, deceased.

Illegal contracts.

The plaintiff claims $ 10,000 for labor and services in procuring for the firm of H. C. Seymour & Co., the contract for the construction and equipment of the Ohio and Mississippi railroad from

Cincinnati to St. Louis. The defendants deny the employment, or that the plaintiff contributed in any way towards obtaining the contract for them.

Hoffman, J. — The case made by the plaintiff is, that he recommended Seymour to one Clement, who knew nothing of him. That Clement recommended Seymour to the directors in consequence of the plaintiff's attestation to his qualities. That Clement was employed when the company was preparing to let the road, and was to have a good commission, which was adjusted afterwards at $ 10,000. That Clement engaged, for these considerations, to use his influence and did use it, to procure the contract for Seymour. That such influence was successful, or at least, influential, in obtaining the object. As he deposes: "We did not stand upon the street corners to do this, but went to work through third parties, and in every way we could."

In addition, when Clement first undertook this office, Davison did not even name to him the intended contractors. He did not appear before the directors openly as Seymour's agent. On the contrary, he first informed them that he had friends at the East, who could send on good men to take the contract. In the course of the negotiations, he named Seymour, but to the directors, individually, as I infer. Nothing appears to have been communicated to the board, collectively.

Undoubtedly this was the employment of Clement, for a bribe, to use personal influence with the directors, to secure a lucrative contract for one, of whose capacity and responsibility he was entirely ignorant. He was to use this secretly and with individuals.

The directors of this great railroad scheme, if they stood not in the capacity of public officers, owing a duty to the State, yet were trustees of the stockholders of the road, and owed the best efforts of industry, integrity, and economy, to them.

No one can deny, that a stipulation for any personal advantage or profit, which might attend and influence the discharge of their trust to the stockholders, would be a violation of duty; and no engagement given to them, or contracts made with them for that object, could bear the scrutiny of the law.

If, again, one of their officers, if Mitchell, for example, empowered to negotiate and finally to settle the contract with Seymour, had received an obligation for the payment of a sum of money for his services, it could never have been enforced. . . . . The learned justice cited and commented upon the following cases in support of the principle which would avoid such agreements: *Gray* v. *Hook*, 4 Comst. 451; *Waldo* v. *Martin*, 4 Barn. & Cress. 319; 1 Carr. & Payne, 1; *Harrington* v. *Duchatel*, 2 Swainton, 167; *Hopkins* v. *Prescott*, 4 Com. Bench Rep. 518; *Money* v. *Maclead*, 2 Simons & Stuart, 301; *Marshall* v. *Baltimore & Ohio Railroad Company*, 16 Howard, U. S. R. 325; *Fuller* v. *Dame*, 18 Pick. 472; and concluded as follows: —

I am led to the conclusion, that it would be impossible to allow Clement to sustain an action upon the agreement with him. There was in it most of the elements of a vicious contract, which have avoided similar obligations in the leading cases cited. There was secrecy, individual application, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promoting, and whose reward he was to receive. There is the difference, that these directors were servants of an organization inferior to that of a State, yet acting in a very spacious sphere, and representing an extensive body of constituents. The difference between their position and that of legislators upon a question like this, appears to me but shadowy.

If, then, the claim of Clement would be promptly rejected, does the present plaintiff stand in a better position? His original employment might have been consistent with an open avowed agency, an intent or instructions to make it known, and thus be free from all objections. But we are left in ignorance of what the terms of such original agreement were, — how far they extended. All is indefinite, except merely an employment. He engages Clement, and here again, that employment may have been perfectly free from censure on the plaintiff's part. But upon the best consideration we can give, we cannot separate the act of Clement from the acts of the plaintiff. There is a legal identity for the purposes of this action. The plaintiff must be held to have employed Clement to do what he did do, or to have been bound to superintend his proceedings, and free them from what was illegal. It is impossible to permit him to profit by the misdeeds of his own agents, however ignorant and exempt from them himself. His ignorance, when knowledge was a duty, becomes equivalent to a fault.

Complaint dismissed.

John Burrill, for plaintiff.

James T. Brady, for defendants.

General Term. May, 1857.

Present: Duer and Hoffman, JJ.

Central Bank of Brooklyn *v.* Lang et al.

Promissory Notes.

Action on a promissory note, drawn by defendants to their own order, and given, without being indorsed, to the Reliance Mutual Insurance Company, for premiums on policies of insurance. The company indorsed it to the plaintiffs, who discounted it in the regular course of business. The defendants offered to prove that the premiums for which the note was given had not been earned, except about $ 300, to which amount they had an offset against the company, and claimed that, as the note was payable to their own order, and was not indorsed, they could make the same defence to

it in the hands of the plaintiffs as if it were in the possession of the original holder.

The plaintiff's case rests upon the law of this State, which provides, (1 Rev. Stat. 768, § 5,) that a promissory note "made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity as against the maker, and all persons having knowledge of the facts, as if payable to bearer."

The defendants insist that this statute imposes on the plaintiff the burden of proving, as a condition precedent to recovery, that the note in suit was negotiated by the makers, that is, transferred for value with intent to vest the title; that the law prior to the enactment, enabled the innocent holder, for value of a note, unindorsed by the payee, to compel the payee, by bill in equity, to indorse the note, but only upon proof that the payee had received value, had intended to indorse a note, and had omitted to indorse it by amere mistake; that the intent of the action was to convert the previously existing equitable right into a legal one; dispensing with a bill in equity for that purpose, but leaving the plaintiff's right to recover, to depend upon the same principles as before its enactment; that this section is referred to in the reviser's original note as being in conformity with the existing law, and that the conformity of the statutory provision with the existing law, is only preserved by requiring the plaintiffs to prove a transfer of the note in suit by defendants for value, with intent to vest the title. The word "negotiated" in the statute was, therefore, intended to imply all these conditions.

By the Court. Hoffman, J. — We apprehend that the note in suit, upon the question of its effect in the hands of a *bonâ fide* holder, is to be regarded precisely as if the makers had indorsed it, provided they negotiate it. And we consider that a note is negotiated within the statute, when it is delivered by the maker for a consideration received or agreed to be received, or delivered for circulation; and where had it been actually indorsed, it would have possessed the character of negotiability. The note in suit was negotiated in this sense. (See 1 Sandf. 648; 2 Ibid. 138; 1 Comst. 374.)

E. C. Benedict, for plaintiff.

John S. Jenness, for defendants.

General Term, May, 1857.

Present: Duer, Bosworth, and Slosson, J.J.

Healy and Reddington *v.* Gilman.

Proof of accounts — Degrees in secondary evidence.

Action for a balance of account. It appears that an account had been rendered to the defendant, setting out the entire transac-

tions between the parties, and it was claimed on the trial before the referee, that this account had been acquiesced in, and that it had the effect of an account stated.

The defendant being called upon on the trial, to produce the original account rendered, declined to do so, and the clerk who made out the original account from the ledger of which it was a mere transcript, then produced another transcript from the ledger of the same account, which he appears to have drawn off for the purposes of the trial, and the same was offered as evidence of the contents of the account, which had been rendered. The witness swore it was a true copy from the books, and he had not a doubt that it was a correct copy of the one rendered, with the exception of one item of credit, which did not appear in the account rendered, because the item had not been then posted in the ledger. The ledger was not in court, nor was any offer made to produce it, in lieu of the copy, nor was the copy read on the ground of convenience, with an offer to produce the book for the purpose of comparison, or as a substitute for the copy if required, but the new transcript was offered as in itself competent evidence of the contents of the original account, after the refusal of the defendant to produce the latter. It was objected to on the ground that it was not the best secondary evidence which it was in the party's power to produce, but was admitted under an exception to the ruling.

SLOSSON, J. — I do not mean to contend that there are any arbitrary or inflexible degrees of secondary evidence, rendering it necessary for a party who is driven to that description of proof, to show affirmatively in every instance, that there is no higher degree within his power than the one he offers; but I think it may be safely said, that where it appears in the very offer, or from the nature of the case itself, or from the circumstances attending the offer, that the party has better and more reliable evidence at hand, and equally within his power, he shall not be permitted to resort to the inferior degree first. As a general principle, the law requires the best evidence within the party's power to produce, and I see no reason why this rule should not equally apply to secondary as to primary proof. There is this difference, it is true, between the two classes of proof: primary proof is necessarily single in its character, while all below it admits of a wide range, and the fact may be established by a variety of evidence, as for example, the contents of a lost paper may be established by a sworn copy made at the time, or by a rough draft, or by mere recollection; but it does not follow that all distinction between these kinds of proof is to be disregarded, and that they are all on a level, and it will hardly be contended, I think, that a witness should be allowed to prove the contents of a lost paper by recollection, when he has in his pocket a sworn, or even an unsworn copy, made by him at the time the paper in question was written. . . . . In *Brown* v. *Woodman*, 6 Car. & Payne, 206, it was ruled at *nisi prius*, by PARKE,

J., that there were no degrees of secondary evidence, and he allowed the contents of a letter which the defendant had written to the plaintiff, and which the plaintiff declined to produce under a notice, to be proved by the oral testimony of a witness, though the defendant had kept a copy of the letter. But he said if there had been a duplicate original, it might have been different.

In the case at bar, the evidence offered is not a compared copy of the account rendered, or a duplicate of that account, in either of which aspects the book from which it was taken, may well be regarded, and which would be the next best evidence to the original itself; but it is a copy of such copy. In swearing to such last transcript, therefore, as a correct copy of the account rendered, the witness is in reality swearing only to the accuracy of it as a transcript from the book, or argumentatively, as a copy of the account rendered, because the latter was also taken from the book.

We think it would be dangerous to hold that such evidence was admissible. If in the case of a lost deed, the party should attempt to prove its contents by producing a copy of a counterpart or of an examined copy of the deed, and which copy so offered, he had made for the purpose of the trial, while the examined copy or counterpart itself was admitted to be in his possession, and could be produced, would he be allowed to do it? Clearly not. Is there any difference in the case of a party refusing to produce on notice an original paper of less solemnity than a deed? Does such refusal justify a lower kind of secondary evidence, on the part of the party calling for its production, than in the case of a lost instrument? It is difficult to perceive why. It is said, the party who refuses to produce the original, cannot complain that the other resorts to evidence of an inferior nature to that which he has in his power to produce, because having the original in his possession, he has the means of correcting any defect in the proof. But this will not always hold good, for it often happens that the original is not produced, because the party called on to produce it, may not have the actual possession or control of it at the time, or may have good and proper reasons for not producing it. The law can look only to the end to be attained, and that is the truth by the best and reliable testimony. (See *United States* v. *Britton*, 2 Mason, 465; *Hilts* v. *Colvin*, 14 J. R. 182; 1 Greenl. Ev. § 84, note; Stark. Ev. part 2d., 364, 365; 2 Atk. 71; 1 Stark. Cases, 257.)

New trial ordered.

E. H. Owen, for plaintiffs.

C. H. Glover, for defendant.

General Term. December, 1856.

Present: DUER, BOSWORTH, and WOODRUFF, J.J.

YOUNG *v.* CATLETT EXECUTRIX OF LAVERTY.

Evidence — Notarial certificate — Examination of witnesses.

The statute of 1833, (see c. 271, p. 395, § 8, Laws of 1833,) after declaring that the certificate of the notary shall be presumptive evidence of the facts therein contained, adds this proviso: "But this section shall not apply to any case in which the defendant shall annex to his plea an affidavit, denying the fact of having received notice of non-acceptance or of non-payment of such note or bill."

Held, that the verification of the answer, as provided by the code of procedure, is not sufficient to satisfy the statute, and preclude the giving of the notary's certificate in evidence.

Held, that the certificate of a notary, of the presentment of a note "to the assignee of the makers, at his and their place of business," is *primâ facie* sufficient. The certificate in this case, when read with the intendment reasonably presumed in favor of the official acts of the notary, may be deemed naturally and fairly to import, that he went to the place of business of the makers, that he found there only their assignee, that he made the presentment to him and demanded payment, which was refused. (See 1 Stark. 475; 2 Hill, 635; 15 Bark. 326, and 2 Sandf. 166.)

In the course of the trial, the defendant's counsel, while examining one of her witnesses, (after numerous questions, all of which were answered with great particularity and readiness, and without any suggestion or pretence of want of recollection of any detail or particular called for,) asked the witness to look, for the purpose of refreshing his memory, at a memorandum copied by himself, (the witness,) from entries made in certain books of account, at or about the time of the transactions in question, by other persons.

Held, that the judge at the trial ruled correctly, in sustaining the objection of the plaintiff's counsel, to the witness's referring to any such paper, for any such purpose. To permit the examining party to place a paper in the hands of a witness under the circumstances stated, in anticipation of the contemplated questions, is to suggest to him the answers that are desired, and is open to the strongest objections that can be urged against the allowance of leading questions. If the witness assumes to know and to remember, and answers the questions proposed, we not only think it unnecessary to refresh his recollection, but that it would be unjust to the adverse party to permit it. An important ground for questioning the credibility of a witness, whether as untruthful or biased, is often found in his assuming to know and state what he does not know, or to recollect what from lapse of time or other circumstances, it is in a high degree improbable that he can remember, and so long as

the witness assumes to answer from memory, we think he should be permitted to do so. If it might be permitted to the examining party, by anticipation, to guard against falsehood, misstatements or indications of partiality, by showing the paper to the witness on the stand, when he gave no intimation of any want of memory, it would be liable to great abuse, and deprive the adverse party of important means of affecting his credibility.

J. Larocque, for plaintiff.

William Bliss, for defendant.

Cases in Maine.

Supreme Judicial Court. 1857. *Penobscot County.*

Sanborn *v.* Morrill.

Costs — Prochein ami.

A *prochein ami*, as such, is not liable for costs. The promise to answer for the debt or default of another must be in writing, to bind the persons thus promising; but where an individual contracts for the performance of services in which he is in no way personally interested, and undertakes to pay for the same, the promise need not be in writing, and such person is liable for the services performed at his instance and on his credit.

A. Sanborn, for plaintiff.

Hilliard, for defendant.

Haynes *v.* Hayward.

Deposition — Waiver of objection.

Where a party objecting to the admissibility of a deposition, waives his objection, and does not limit his waiver, but at a future trial, for the same reasons again objects to the deposition, the presiding judge may admit it.

Sanborn, for plaintiff.

Blake, for defendant.

Leavitt *v.* City of Bangor.

Prochein ami — Witness.

The plaintiff by her next friend brought an action to recover damages for injuries sustained through a defect in the highway.

The mother of the plaintiff, wife of the *prochein ami*, was introduced as a witness.

Held, a *prochein ami* may be regarded as a party for certain purposes, but is not responsible for costs. The testimony of the wife of a *prochein ami* should not be excluded on the ground of any interest of her husband in the suit.

J. A. Peters, for plaintiff.

Waterhouse, for defendant.

McPheters *v.* Lumbert.

Lien.

This action was brought for personal services in driving logs, and to enforce a lien upon the logs. The defendants of record made no defence, but the owners of the logs on which the lien was alleged to have existed came into court and defended the action, claiming the right to test the existence and validity of such lien.

Held, that the question of lien was a side issue, not to be determined in the present suit.

Rowe and *Bartlett*, for plaintiff.

Ingersoll, for defendant.

Trim *v.* Inhabitants of Charleston.

Tax — Liability of towns.

Action to recover the amount of a tax, alleged to have been illegally raised by a supposed school district in said Charleston.

Held, that a town was not liable for the improper proceedings of a majority of a school district.

A. Sanborn, for plaintiff.

J. A. Peters, for defendant.

Kennebec County.

Wellington *v.* Murdough.

Deed.

The legal rights of parties as exhibited by a deed, cannot be varied or destroyed by the subsequent acts and declarations of the parties.

A. Libbey, for plaintiff.

Piscataquis County.

Maxwell *v.* Haynes.

Statute of frauds.

The defendants bought out parties engaged in logging, promising said parties to pay certain bills contracted by them; among

which was the plaintiffs'. Upon the presentation of the bill by plaintiffs, the defendants promised to pay them, and afterwards refused, relying for a defence on the statute of frauds.

Held, that the promise was based upon a new and original consideration of benefit or harm, moving between the newly contracting parties, and that it was not, therefore, within the statute of frauds.

Everett, for plaintiffs.

A. Sanborn, for defendants.

Lincoln County.

Harley *v.* Bryant.

Costs.

The Rev. Stat. ch. 115, sect. 104, provides that "No first execution shall be issued after the expiration of one year, from the time judgment was entered." The plaintiff failed to file in the clerk's office within one year from the rendition of judgment, the items of costs claimed by him, and the clerk refused to tax the same, and referred the parties to the judge at *nisi prius*, who allowed the bill of costs to be taxed before the clerk.

Defendant excepted to this ruling.

Held, the case involved a question of fact for the final judgment and discretion of the presiding judge; from his decision no exceptions will lie.

J. Ruggles, for plaintiff.

H. C. Lowell, for defendant.

Penobscot County.

Inhabitants of Eddington *v.* Inhabitants of Brewer.

Support of pauper and children.

The pauper was born in Brewer, and had a residence in said town by derivation from her father. She married an unnaturalized foreigner, having no settlement in this State. They removed after marriage to the easterly part of Brewer, and in 1852, while they continued to reside in Brewer, the town of Holden, composed of said easterly part of Brewer, was incorporated. In 1855 a portion of the town of Brewer, including the former home of the pauper, was annexed to Eddington.

Held, that the settlement of a married woman follows that of her husband, if he have any within the State; otherwise, her own at the time of marriage, if she then had any, shall not be suspended or lost by the marriage. By operation of law her settlement was transferred from Brewer to Holden; her children follow and have her settlement, the father having none within the State.

A. W. Paine, for inhabitants of Eddington.

J. A. Peters, for inhabitants of Brewer.

Kennebec County.

LOVETT *v.* PIKE. HOWE *v.* SAME.

Liability of sheriffs.

A deputy sheriff attached personal property, but made no appraisal or schedule of the goods attached until a year after the attachment.

A portion of the goods of a perishable nature was sold before judgment was recovered.

After the rendition of judgment and issue of execution, the remainder of the goods were legally advertised and sold. The deputy purchased a part himself. He indorsed his doings upon the back of the execution, but deceased without affixing his signature thereto.

The plaintiff claimed that the defendant should be held liable for the appraised value of the goods, on account of the improper disposition of the property attached, and the partial non-compliance with the law.

Held, that the purchase of goods by the deputy was a conversion, for which trover would lie, and the amount paid therefor, if allowed on the execution, might be shown in reduction of damages; but if the sale was for a fair price, and the proceeds were allowed the creditor, he has no just cause of complaint. The defendant should be held liable for the sales of the goods as proved to have been made. The expenses of keeping and selling the same should be deducted from this sum, and judgment should be rendered for the remainder, and interest thereon from the date of the writ.

J. S. Abbott, for plaintiff.

Hutchinson, for defendant.

MOULTON *v.* FAUGHT.

Deed — Reservation.

Trespass to recover damages for injuries to a dam built by plaintiff on land of defendant. Defendant acquired the title to the land on which the dam was built, from one Southwick. The deed contained the following reservation, "Reserving to the said Southwick and his successors the privilege of flowing by a dam situated at the outlet of the bog, as much of the above described premises as may be useful to them for the benefit of machinery, situated at the brook below." The title to the premises, for the benefit of which this reservation was made, passed to David Pingree, who gave a bond to Henry Cutter to convey to him by deed of quit claim, "all his (Pingree's) right, title and interest in and to certain estate," &c.

The plaintiff claimed a right to erect a dam by virtue of the verbal permission of Cutter.

Held, that the title of plaintiff was not from Southwick or his successors, and the reservation was not for the mills occupied by plaintiff.

The right to erect and maintain a dam on the land of another, must be regarded as such an interest in real estate as cannot pass by parol.

H. W. Paine, for plaintiff.

Vose, for defendant.

Lincoln County.

Ames *v.* Dyer.

Lien.

Plaintiffs claimed a lien on a ship for the materials furnished for the moulds of said ship, and labor in making the same.

Held, the labor and materials did not enter into the actual construction of the ship, therefore no lien was created.

J. A. Meserve, for plaintiff.

A. P. Gould, for defendant.

Smith *v.* Gorman.

Referee — Husband and wife.

A referee may receive or reject testimony, which by the rules of the common law is inadmissible. The force and effect of the evidence, and the legal rights of the parties, are for his judgment and discretion.

By St. 1848, ch. 73, sec. 1, "Any married woman may commence, prosecute or defend any suit in law or equity, to final judgment and execution in her own name, in the same manner as if she was unmarried, or she may prosecute or defend such suit jointly with her husband."

Under this statute the wife cannot maintain an action against the husband. It does not authorize the issue of an execution in favor of the husband against the wife.

J. M. Carleton, for plaintiff.

L. Clay, for defendant.

Penobscot County.

Prentiss *v.* Kelley.

Partnership.

Plaintiffs brought an action to recover their fees of defendants,

for professional services in a suit, in which the said defendants were plaintiffs as copartners.

The plaintiffs in the present case were employed by Perkins alone. The defendant, Kelley, denied the partnership.

Held, the entrance and continuance of a suit in open court, without other proof of notice to the parties, is not sufficient evidence of a partnership.

Prentiss, for plaintiff.

A. H. Priggs, for defendant.

Dolan *v.* Bussell.

Intoxicating liquors.

Trespass to recover the value of certain liquors. Defendant pleaded that he, as an officer, was justified in taking them.

The court ruled that the evidence under plea of justification was insufficient; but that if the jury believed that the liquors were intended for sale in violation of law, the plaintiff could not maintain his action.

The verdict was for the defendant. To the ruling of the judge the plaintiff excepted.

Held, at common law a mere intent to sell property in violation of law, which may be used for lawful purposes, did not subject it to forfeiture, and the owner was not deprived of his proper remedy against persons interfering with it; but by Statute 1851, ch. 211, sec. 16, "it is provided that no action of any kind shall be maintained in any court in this State, either in whole or in part for intoxicating or spirituous liquors sold in any other State or county whatever, nor shall any action of any kind be had or maintained in any court of the State, for the recovery or possession of intoxicating or spirituous liquors, or the value thereof."

The limitation of the act by judicial construction, or the unconstitutionality of the act, as applied to this suit, were not contended for. The exceptions were overruled, and judgment was rendered on the verdict.

Waterhouse, for plaintiff.

Godfrey, for defendant.

Recent English Cases.

Privy Council, July 8.

THE MOBILE.

Ships and shipping — Pilot.

St. 6, Geo. 4, c. 125, § 55, provides that no owner or master of a vessel shall be answerable for any loss or damage which shall happen by reason of the neglect, default, &c. of any licensed pilot acting in charge of such vessel.

Held, that the owners are not exempted unless the pilot is exclusively to blame. So where the pilot has gone below for a few minutes, leaving the second mate in command, with general directions how to steer, and a collision occurs partly through the fault of this officer, the ship is responsible.

NETHERLANDS STEAMBOAT CO. *v.* STYLES.

Ships and shipping — Pilot.

So where a steamer, proceeding at an improper rate of speed among vessels at anchor, caused so heavy a swell as to sink a barge,

Held, that the master and crew of a vessel, having a pilot on board, are bound to keep a proper look out; as they had not done so in this case, and the loss was partly occasioned thereby, although the rate of speed was regulated by the pilot, the owners of the steamer were liable.

July 15.

HUGHES *v.* HOSKING.

Will — Republication — After acquired property.

A testator, by his will, made in 1824, devised the residue of his real estate, by words which would not carry after acquired property, to A, in part, with remainder to the testator's heirs. He purchased other lands, and afterwards made a condicil, in which he recited the residuary disposition, and said, "I hereby reverse such part of said bequest as relates to my own right heirs, and do give, devise, and bequeath the same real estate in the event of A's dying without issue to B."

Held, that this condicil operated only on the real estate originally devised by the will, that the residuary clause could not be extended by construction to the lands purchased between the date of the will and that of the codicil.

Exchequer Chamber, November 27.

Stokes *v.* Cox.

Fire insurance — Description of premises — Alteration.

For a statement of the facts in this case, see 19 Law Reporter, 356. *Held*, (reversing the decision of the Exchequer,) that as the condition respecting alterations only required notice to be given when the risk was increased, and the jury found that the risk had not been increased in this case, the plaintiff was entitled to recover.

Booth *v.* Kennard.

Patent — Omission of one process.

Before the date of the plaintiff's invention, gas had been produced from vegetable oils extracted from seeds, and the improvement claimed was the discovery that the intermediate process of expressing the oil from the seed might be dispensed with, and the gas be made directly from the seed, by which one process was saved and a cheaper article produced.

Held, that the invention was useful, and patentable.

Queen's Bench, November 21.

Russell *v.* Pellegrini.

Arbitration clause, when to be enforced.

The common law procedure act of 1854, § 11, provides that where an action is brought in respect of matters which have been agreed in writing to be referred, the court, if satisfied that no reason exists why the matters should not be referred, may order a stay of proceedings in the action. A charter-party contained a clause that "if any difference of opinion should arise between the parties to this contract, either in principle or detail," it should be referred to arbitration. This suit was brought for freight, which, under the charter-party, was payable monthly. The defendant claimed that he had suffered damage from the unseaworthiness of the vessel, alleged an offer to refer, and prayed a stay of proceedings.

Held, that although the defendant's claim was not properly a subject of set-off, but one for which a cross-action must be brought, yet it formed part of the difference of opinion between the parties, and affected the question of the defendant's eventual liability, and therefore the action for freight was substantially brought in respect of matters agreed to be referred.

Common Bench, November 25.

WALLIS *v.* HISSCH.

Arbitration clause, when to be enforced.

But where in a suit upon a contract for the sale of goods, it appeared that a question of fraud was raised *bonâ fide*, and was the principal question in the case,

Held, that the court would, in their discretion, refuse to enforce a reference, although the fraud alleged was in respect to the quality of the goods, and all questions of quality were agreed to be referred.

Queen's Bench, November 22.

MARTIN *v.* ANDREWS.

Assumpsit — Witness.

Where a witness was served with a *subpœna*, and paid his conduct-money, (travel,) but never attended the trial, having notice that the cause was settled,

Held, that the money could be recovered back, upon the ground of a failure of consideration.

November 25.

THOMPSON *v.* HOPPER.

Marine insurance — Loss occasioned by misconduct of owner — causa sine quâ non.

In this case, (see 19 Law Reporter, 99,) issue was joined on the third plea, which alleged that the plaintiffs wrongly permitted the vessel to remain on the high seas, near the shore, in an unseaworthy condition, during which time, by reason of the premises, the vessel was wrecked, and totally lost.

Held, that the jury should have been instructed to find whether the conduct of the plaintiff in sending the vessel to sea in an improper condition was a cause without which the loss would not have happened. And the instruction having been given that the jury were to say whether the unseaworthiness was the proximate cause of the loss, a new trial was ordered, with liberty to the plaintiff to appeal.

Rolls Court, July 16.

ASTLE *v.* WRIGHT.

Partnership — Dissolution — Apportionment of premium.

Where one partner paid 1000*l.* as a premium for admission into the business, and the partnership was to continue for a term of

years, but from the fault of both parties a dissolution became desirable, and was sued for and not resisted,

Held, that the premium should be apportioned, and the party paying should recover back such part as was represented by the unexpired time.

November 12.

UNIVERSITY OF LONDON *v.* YARROW.

Will — Charity.

A bequest to trustees for founding and establishing an institution to investigate and cure the maladies of quadrupeds and birds, useful to man:

Held, a good charitable bequest.

Intelligence and Miscellany.

DOG DAYS. — The presence of the midsummer heat and holidays has a quieting effect upon litigation, and there is very little legal intelligence to record. In the city of New York a good many important questions have been agitated of late, but as the pleadings appear to have been framed chiefly according to club law, and heads, rather than covenants, to have been broken, we do not feel called upon to take special note of the proceedings at present.

TENANT BY THE CURTESY. — Young Jones, now a member of the bar in one of the New England towns, is a young gentleman of high culture and eminent attainments. After studying in the chief cities of America and Europe, he presented himself to be examined for admission to the rank of counsellor before one of the few judges who retain in this age the manners, and reverence the learning, of a former generation. After trying him in some of the more abstruse points of "black-letter" knowledge, with no very satisfactory result, the learned examiner, in despair, put our friend this question:

Q. — What is tenancy by the curtesy of England?

A. — (Promptly.) — It is the same thing as tenancy by sufferance; a very frail tenure. Thus the native princes of India are tenants by the courtesy of England, and are liable to be turned out any day.

Notices of New Publications.

A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW. By THEODORE SEDGWICK. New York: John S. Voorhies. 1857. pp. 712.

Mr. Sedgwick is well known to the profession by his valuable book on the measure of damages, a book which, although it advanced some doctrines which we considered unsupported by principle and authority, and against which we, at the time of its publication, entered our protest, is un-

doubtedly of great value, as reducing the law upon this important subject to order and system, and it has had a wide circulation and a deserved success both in this country and in England. In the work now before us the learned author has also happily chosen a subject of great interest, and one upon which few text books are to be found. The great feature of our jurisprudence, which distinguishes it from that of all other countries, is the existence of written constitutions, which prescribe limits to the power of the government, and establish a fundamental law, to be interpreted by the courts, as a bulwark between the popular will of the passing hour, and the serious and sober expression of that will authentically manifested in these great charters. Under other forms of government the fundamental law has less power. *Magna Charter*, for instance, the great original of all these modern constitutions, appeals, however solemly, only to the discretion of parliament, and the judges of England cannot abrogate a law passed with due formality because it conflicts with any of the principles of the constitution.

The American charters, derived from a common source, present a great uniformity of general appearance; they all provide for the distribution of the powers of government among the three departments, executive, legislative and judicial, and forbid either to overstep its own limits; they guarantee trial by jury, equality of taxation, protection to persons and property against arbitrary acts of either department, as well as against private oppression, &c. But all these are expressed in general terms, and it is left to the judicial department to expound their meaning and enforce their sanction. Mr. Sedgwick gives in a manner at once elegant and clear a synopsis of all the decisions, and a judicious estimate of their respective authority and effect. We recommend especially to the careful attention of our readers his fifth chapter upon the boundaries of legislative and judicial power.

Our author's subject carries him also into a general consideration, which he conducts in a highly able and scholarlike manner, of the construction of statutes, a department not so entirely new, but in its practical importance to the workingmen of the profession, not inferior to any branch of the law, and his views upon this branch are thoughtfully studied out and well expressed.

A Practical Treatise on the Law of Carriers of Goods and Passengers by Land, Inland Navigation, and in Ships. With an Appendix of Statutes and Forms of Pleadings. By Tompson Chitty, Esq., and Leofric Temple, Esq. With Notes and References to the American Decisions. By David W. Sellers. Philadelphia: T. & J. W. Johnson & Co. 1857. pp. 642.

From the rapid growth of statutes, those annual plants which flourish in our mother country, almost as well as on this side of the Atlantic, the law of the two great communities who own a common source of jurisprudence in the common law, is steadily diverging. The English law of carriers has been so much modified by parliamentary enactment, that it is difficult to present a perfectly comprehensive and intelligible view of its present state in a treatise written in America. But that law is of great importance to us in the way of example and illustration, as well as from the daily increasing intercourse between merchants of the two countries. The editor and publishers of Mr. Chitty's treatise have done wisely therefore in republishing it here, and in giving only the leading American authorities. It will be of great service to the profession and to legislators.

Obituary Notices.

Hon. Thomas J. Oakley, Chief Justice of the Superior Court of the City of New York, died in that city, May 12, 1857. Judge Oakley's career was one of unbroken success. He was born about 1782, in Duchess County, which has produced many eminent lawyers; in 1810 he was appointed Surrogate of Duchess County; in 1813 he was elected to Congress and served one term; in 1815 he sat in the New York Assembly; in 1819 he succeeded Mr. Van Buren as Attorney General of the State; in 1820 he served again in the Assembly; and in 1827 again in Congress. When the Superior Court of the City of New York was organized in 1828, the bar of the city, who had originated the law for the new court and procured its passage, met and recommended for the appointment of judges, William Slosson, Thomas J. Oakley, and Peter A. Jay; Mr. Oakley alone was appointed, however, he with Josiah Ogden Hoffman being the associate justices, and Samuel Innes, Chief Justice. When the court was reorganized under the Constitution of 1846, the subject of this notice was made Chief Justice, which office he held at the time of his death, having sat on the bench of that court nearly thirty years.

Such is a brief sketch of Judge Oakley's public life. In all these positions his strong, manly, and accurate intellect, his prudence, and his knowledge of men, marked him out as a person entitled to lead. As a member of deliberative assemblies, he is thus characterized by a competent observer: "As a clear, ingenious, and logical, though sometimes sophistical reasoner, he has appeared to me unrivalled in our legislative halls at Albany. He is not an orator. He fails of being so from his want of ardor of feeling, and his utter lack of imaginative powers. His coolness, his caution, his forecast, and his perfect self-command, peculiarly fit him for a party leader in a legislative assembly. In Congress he differed from the over-zealous Eastern Federalists. He wished, at least, to manifest an apparent disposition to furnish supplies to government, in carrying on the war, and to confine his opposition to the *manner* in which the war was carried on. Mr. Clayton, an old and sagacious Virginian politician, told me, in 1816, that, had the federal members of Congress, during the war, put themselves exclusively under the management of Oakley, and implicitly followed his lead, in his judgment the Administration would have been prostrated." — *Hammond's Political History of New York.*

At the bar these same qualities gave him eminence, especially in arguments to the bench, in which his clearness of statement, and great logical acumen were fully exercised. One of the last cases which he argued before his appointment to the bench, was the famous one of *Gibbons* v. *Ogden*, before the Supreme Court of the United States, in which he supported the right of the State of New York to grant to Robert Fulton and his associates, an exclusive privilege of navigating her waters with steamboats. His view had been sustained by every court of the State, though eventually overruled by the court of last resort. Of this case, and of Judge Oakley's part in it, Mr. Daniel Lord thus spoke at the bar meeting called upon his decease:

"Judge Oakley represented the mighty sovereignty of the State of New York. His associate was Thomas Addis Emmett. And by whom were they met? By Daniel Webster and William Wirt. These four men debated that question before Marshall, Story, Washington, Todd, and Thompson. This I conceive to have been the culmination of professional eminence. What court could have so great a question? What court could

be so greatly constituted? What court had the power of bringing private men to sit in judgment upon sovereign States? What court could feel the capacity to arbitrate among arguments of such talent, power, and learning? No one will say that the argument of Mr. Oakley on that occasion did not place him at least, in the front rank, if not superior to others. This was a noble achievement! It ought, and it did satisfy his ambition at the bar. To him the bar could have no higher honors, and he took a seat on the bench. How he has administered justice there I have already said. So are judges to be trained."

But it was upon the bench, which he adorned for nearly thirty years, that he acquired his chief and most enduring reputation. And here his vigor and discrimination of mind, his impartiality in the largest sense, including a freedom from intellectual as well as moral bias, his strong common sense and practical sagacity, established his reputation on an enduring basis, and makes the place which his death leaves vacant, difficult, if not impossible, adequately to fill. The venerable Judge Duer has promised to give the world, in a permanent form, his reminiscences of the life of his early friend and late associate. It will be looked for with great interest.

Hon. Joshua A. Spencer, of Utica, New York, died April 24th, 1857. He was born at Great Barrington, Massachusetts, on the 13th of May, 1790. He was of a humble origin, and at a very early age was turned adrift upon the world to make his own way. He removed to Greenville, N. Y., and served for some time as an apprentice to a clothier. Afterwards he learned the carpenter's trade, and while still earning his bread as a mechanic, began to educate himself and to study law. After seven years' study he was admitted to the bar of Madison County, New York, and was just fairly established there, when the war of 1812 broke out. He served during the war as a subordinate officer of the local militia upon the northern frontier of New York, and upon its termination, returned to the practice of his profession. In 1829 Mr. Spencer moved to Utica, and joined the bar of Oneida County, of which he was, at his death, a highly esteemed and prominent member.

He was not a man of large literary attainments or knowledge. His only advantages had been those of a common county school, but he had a sufficient acquaintance with the works of the best English authors. He had no fondness for the niceties of his profession. He did not relish the *apices juris;* but he loved and admired the great principles of the law. He had a strong and vigorous mind, which grasped readily and firmly the strong points of a case and never lost sight of them. The associations of his early life had made him very familiar with the habits of thought and feeling among mechanics and laboring men, and this often enabled him to address juries with extraordinary power, by adapting his train of argument and illustration and the style of his speeches to their sympathies and comprehension. For many years before his death he was recognized throughout all Western New York as a most powerful and formidable opponent, especially in trials at *nisi prius*. Indeed we have heard it said that as a jury advocate he stood at the head of the bar of the whole State of New York.

He was a man of a commanding figure, a fine voice, and a certain stateliness of manner. His style in speaking was plain, forcible, and direct; never indulging in any richness of diction, or abundance of illustration or ornament; but sometimes, though rarely, rising to the simple majesty of the purest oratory. He was a good citizen, a kind neighbor, and a warm

friend. His real kindliness of heart, his uniform courtesy, his ready sympathies, and the great integrity and purity of his life and character, had gained him the respect and affection of the members of the bar and the bench in the courts where he used to practise. The various addresses made upon the occasion of his death bear ample evidence of the high admiration for his talents, and the strong personal esteem felt for him by all who knew him.

THE LATE SERGEANT WILKINS. — In Mr. Wilkins the English bar has lost one of the most popular and eloquent advocates of his time.

His career was somewhat erratic. He was the son of a physician at Islington, and was educated for that profession, but we believe never practised. He was a somewhat "fast" young man, and by his dissipation offended his father, who cast him off; and being a good mimic and singer, young Wilkins went about the country picking up a living in club-rooms, &c., in company with a young man of like attainments. His ardent and impressible mind, however, was so much influenced by the preaching of Dr. Newton, the Wesleyan Divine, that he renounced his vagrant habits, and engaged as a local preacher. He was a capital speaker, and subsequently served Sergeant Wilde so well in his contest with Gladstone in the election for Newark, that Wilde introduced him to the legal profession, paid his fees, and started him in business. He was called to the English bar by the society of the inner temple on the 12th of June, 1835, and joined the northern circuit. He first came into notice as an able defender of prisoners, at the quarter sessions for South Lancashire, and at the Liverpool assizes. He afterwards went the West Riding sessions, and won further distinction there and in the criminal courts of York and other towns of the circuit. He was also beginning to obtain a reputation in the central criminal court in London, when, in 1845, he was made a sergeant at law, and he then attached himself more to the civil side of the common law courts. His success speedily increased. He was in especial demand in cases of breaches of promise and criminal conversation, though his business was by no means confined to that class of practice. His engagements in London, and especially in the northern circuit became enormous, and his professional income amounted, in the later years of his life, to 7,000*l.* and 8,000*l.* a-year. He was fast rising to the pinnacle of professional fame, when, some two years ago, extreme toil, aided perhaps by irregular and convivial habits, induced an illness from which he never fully recovered. His health and strength gradually declined, and after a severe struggle, he died on the fifth of March last at his chambers, in the Temple.

Mr. Wilkins was a man of large proportions, tall, and swarthy complexion. "As a forensic orator," says a London journal, "and cross-examiner of witnesses, Mr. Sergeant Wilkins had indeed few equals. His effect in producing feelings, whether serious or mirthful, on his audience, was not unlike what is related of Curran. His tact and skill, in dealing with an adverse, and particularly with an untruthful witness, were wonderful." Sergeant Wilkins was latterly employed in most great causes where his eloquence would have a chance of telling, and, since Mr. Charles Phillips left the central criminal court, few important trials of note occurred there in which he was not retained on one side or the other.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
Barron, Wm. E.	Wrentham,	May 19, 1857.	Francis Hilliard.
Blish, George	Boston,	" 2,	Isaac Ames.
Bliss, Almus	Ware,	" 28,	Horace J. Hodges.
Bryant, Samuel J.	Stoneham,	" 28,	L. J. Fletcher.
Bugbee, Orrin (*a*)	Boston,	Not stated.	Isaac Ames.
Butler, Enoch	Groveland,	May 4,	Henry B. Fernald.
Cabot, Wm F (*b*)	Boston,	" 9,	Isaac Ames
Caswell, Hiram	Greenwich,	" 9,	Horace J. Hodges.
Chapman, Albert B. (*b*)	Cambridge,	" 9,	Isaac Ames.
Coolidge, Charles	Westminster,	" 4,	Alexander H. Bullock.
Crossman, Charles P. (*c*)	Warren,	" 26,	Alexander H. Bullock.
Daily, John (*d*)	Watertown,	" 1,	L. J. Fletcher.
Davis, Horatio E.	Boston,	" 28,	Isaac Ames.
Doorley, James	Woburn,	" 20,	L. J. Fletcher.
French, Nathan	Malden,	" 29,	L. J. Fletcher
Fuller, Andrew L.	Clinton,	" 29,	Alexander H. Bullock
Gallagher, Patrick (*d*)	Watertown,	1,	L. J. Fletcher.
Gilfether, James	New Bedford,	" 18,	Joshua C. Stone.
Hale, James M. (*b*)	Cambridge,	" 9,	Isaac Ames.
Hall, Wm. S.	New Bedford,	" 19,	Joshua C. Stone.
Hidden, Wm. H. (*a*)	Cambridge,	Not stated.	Isaac Ames.
Holmes, Edwin } (*e*)	Boston,	" 30,	Isaac Ames.
Holmes, John } (*e*)	Charlestown,	" 30,	Isaac Ames.
Hosmer, John E.	Acton,	" 2,	L. J. Fletcher.
Howard, Edward A. (*d*)	Watertown,	" 1,	L. J. Fletcher.
Hoyt, Benj. E.	Lawrence,	" 9,	Henry B. Fernald.
Johnson, Artemas W.	Hopkinton,	" 28,	L. J. Fletcher.
Johnson, Wm. A.	Westfield,	" 16,	John M. Stebbins.
Kent, Charles C. (*a*)	Boston,	Not stated.	Isaac Ames.
Lakin, Loammi B.	Boston,	May 2,	Isaac Ames.
Lane, James	Chelsea,	" 27,	Isaac Ames
Leach, Wm.	Boston,	" 30,	Isaac Ames.
Lewands, Adolph	Watertown,	" 30,	L. J. Fletcher.
Lewis, Thomas	Boston,	" 15,	Isaac Ames.
Looby, Patrick	Salem,	" 29,	Henry B. Fernald.
Lord, Thomas B (*b*)	Cambridge,	" 9,	Isaac Ames.
Moore, Charles H.	Boston,	" 22,	Isaac Ames.
Noyes, Daniel	Abington,	" 15,	David Perkins.
Orne, Wm.	Boston,	" 25,	Isaac Ames.
Page, Saml. W.	Newton,	" 21,	L. J. Fletcher.
Parker, Ebenezer	Charlestown,	" 22,	L. J. Fletcher.
Pease, Edward	Lynn,	" 19,	Henry B. Fernald.
Richardson, Lovell S. (*c*)	Warren,	" 26,	Alexander H. Bullock.
Ritchie, Samuel	Boston,	" 11,	Isaac Ames.
Russell, Edward T.	Cambridge,	" 21,	Isaac Ames.
Savil, George	Quincy,	" 1,	Francis Hilliard.
Simonds, Alex'r.	Boston,	" 25,	Isaac Ames.
Spaulding, Amos P.	Palmer,	" 14,	John M. Stebbins.
Strouss, Joseph	Boston,	" 5,	Isaac Ames.
Thayer, Amos	Worcester,	" 21,	Alexander H. Bullock.
Train, Enoch	Dorchester,	" 2,	Francis Hilliard.
Tribon, Lyman E.	North Bridgewater,	" 21,	David Perkins.
Tuttle, Isaiah W.	Somerville,	" 4,	L. J. Fletcher.
Walcott, Luther	Carlisle,	" 21,	L. J. Fletcher.
Whitman, Edward S. (*a*)	Boston,	Not stated.	Isaac Ames.
Worcester, Francis	East Bridgewater,	May 22,	David Perkins.
Wright, Emory (*b*)	Boston,	" 9,	Isaac Ames.

(*a*) Bugbee, Hidden & Co.
(*b*) Chapman, Lord, Wright & Co.
(*c*) Charles P. Crossman & Co.
(*d*) John Daily & Co.
(*e*) E. & J. Holmes.